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IN THE

Supreme Court of the United States

October Term, 1958

No. 771

WILLIAM GERT, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY d/b/a Lorac Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO. INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

against

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRIS L. PRESENT,
375 Park Avenue,
New York, New York,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & FRIEDMAN,
350 Fifth Avenue,
New York, New York,
of Counsel.

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No.

WILLIAM GART, *et al.*,

Petitioners,

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ALBERT M. COLE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY, WILLIAM LOEBNER, HOWDIBON GARAGE, CO., INC., SCHUCKMAN PRESS, INC., and 145-147 W. 61st Street Corporation, petitioners herein, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 16, 1959, which affirmed the judgment of the District Court of the Southern District of New York entered on August 5, 1958 granting respondents' motion for summary judgment and dismissing petitioners' complaint.

Opinions Below

The opinion of the Court of Appeals has not been officially reported but is set forth in Appendix B, *infra*, pp. 26-36.

The opinion of the District Court is reported at 166 F. Supp. 129 and is also set forth in Appellants' Appendix as printed for the use of the Court below. (pp. 156a-165a)[1]

Jurisdiction

The judgment of the Court of Appeals was entered on January 16, 1959. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254.

Questions Presented

1. Whether in the circumstances of this case, the action of the Federal Housing and Home Finance Agency in granting Federal approval to the Lincoln Square Urban Renewal Project is in violation of the "establishment of religion" clause of the First Amendment to the Constitution of the United States?

2. Whether under the provisions of Title I of the Housing Act of 1949, 63 Stat. 413, as amended, 42 U.S.C. Sections 1441 et seq., tenant petitioners had a right to be heard and present testimony before the Federal Housing and Home Finance Agency in support of their objections to the relocation plan of the Lincoln Square Urban Renewal Project?

Constitutional and Statutory Provisions Involved:

The Constitutional provisions involved are the First and Fifth Amendments to the Constitution of the

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[1] The page references designated by the letter "a" as used throughout, refer to the Appendix to Appellants' Brief as printed for the use of the court below.

United States. The statutes involved are Title I of the Housing Act of 1949, 63 Stat. 413, as amended, 42 U.S.C. Sections 1441 et seq.; and Section 5 of the Administrative Procedure Act of 1946, 60 Stat. 239, 5 U.S.C. Section 1004. All relevant portions of the Constitutional and statutory provisions are set forth in Appendix "A", *infra*, at pp. 17-25.

Statement of the Case

A. The Parties.

Petitioners are residential tenants, business tenants or owners of real property in that portion of the West Side of Manhattan in the City of New York which has been designated as the Lincoln Square Urban Renewal Area.

Respondents are Albert M. Cole, Administrator of the Federal Housing and Home Finance Agency and Walter S. Fried, Regional Administrator of Region I which region includes the City of New York within its territorial jurisdiction.

Respondents also include the City of New York, officials of the City of New York and sponsors and redevelopers of the Lincoln Square Urban Renewal Project. While they are named herein as respondents, this petition is not directed to that portion of the judgment of the court below which affirmed the District Court's dismissal of the complaint as to these respondents on the grounds that a judgment in a prior state court action in which they were parties, was res judicata. Plaintiffs in the State Court action petitioned this Court for a writ of certiorari on First and Fourteenth Amendment grounds, but the petition was denied.[2]

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[2] *64th Street Residences, Inc. et al, v. City of New York et al.*, 4 N. Y. 2d 268, affirming 5 A. D. 2d 824, cert. den. sub. nom. *Harris et al.* v. *City of New York et al.*, 357 U. S. 907.

B. The Lincoln Square Urban Renewal Plan

In 1954 the Committee on Slum Clearance of the City of New York requested and obtained federal planning funds under Title I of the Housing Act of 1949 for an urban renewal study of the Lincoln Square area. In 1955, after an initial study had been made, the Committee solicited sponsors to redevelop the area. One of the sponsors selected was Fordham University which assured the city that it would purchase a site in excess of 300,000 square feet for collegiate purposes. After the selection of sponsors, redevelopment and site plans were formulated which incorporated the sponsors' proposed uses as specific "reuse" restrictions for site redevelopment. (11a-19a, 35a, 38a)

On May 28, 1956, the Committee on Slum Clearance submitted its report to the Mayor and the Board of Estimate in which Fordham University was designated as tentative sponsor for a specifically defined area, and the Committee stated that Fordham would redevelop this area by erecting a group of school buildings, comprising the schools of law, education, business and social service. (14a)

On September 27, 1956, the Board of Estimate granted the Committee authority to present and further process the plan with the Federal Urban Renewal Administration. (12a, 39a-40a)

On November 12, 1956, petitioners Schuckman Press, Inc. and Howdibon Garage Co. Inc., along with a number of residential tenants in the Lincoln Square area, petitioned the Federal Housing and Home Finance Administrator to "intervene and be heard on behalf of themselves and all others similarly situated" with respect to the Lincoln Square Urban Renewal Project. The petition raised questions regarding the adequacy of the proposed relocation plan and its failure to comply with the statutory requirements of Title I of the Housing Act of 1949 and further contended that the renewal plan contemplated the giving of federal and state financial aid and subsidy to

religious organizations. (15a-17a, 63a-67a) However, on November 20, 1956, the Federal Housing and Home Finance Administrator denied the petitioners an opportunity to intervene and be heard with respect to these objections to the project, and this denial was confirmed by letter dated January 22, 1957. (17a, 70a)

On October 2, 1957, after a local hearing, the City Planning Commission approved the final plan as an entity and referred it back to the Board of Estimate for further processing. (18a-19a, 41a) On October 25, 1957, the Board of Estimate held its hearing, and on November 26, 1957, the Board passed a series of resolutions approving (1) the Lincoln Square Urban Renewal plan in its entirety, (2) the acquisition of the project area, (3) the execution of a capital grant contract with the Federal Government, and (4) the sponsorship agreements with the various sponsors, including Fordham University.

The agreement wtih Fordham University obligated Fordham to bid a minimum amount of $2,241,610 at the public auction, and, if successful, to redevelop the site in accordance with the terms of the redevelopment plan. In turn, the City obligated itself to acquire the site by purchase or condemnation and to sell it to Fordham if it was the highest bidder at the public auction held pursuant to Section 72-k of the New York General Municipal Law. (18a-19a)

The site for which Fordham had been the sponsor was subject to a reuse restriction upon potential bidders that the site be used only for redevelopment for educational purposes with campus type structures and layout. In addition to the educational site, the redevelopment plan contained a substantial site restricted to redevelopment as a performing arts center with required erection of a concert hall and opera house. The sponsor for this site was Lincoln Center for the Performing Arts, Inc., a non-profit corporation, which had been specifically organized for this purpose.

There was also a housing site sponsored by the Webb & Knapp Lincoln Square Corporation.

The minimum price which Fordham had agreed to bid was $7.00 a square foot, an amount which had been reached after negotiation between the City of New York and Fordham University. A similar minimum bid was negotiated for the housing site and the minimum bid for the performing arts center was established at $10.60 per square foot. (13a, 19a-20a, 44a)

On December 26, 1957, the Federal Housing and Home Finance Administrator, without a hearing, approved the plan and the proposed capital grant contract, giving no notice to those who had previously petitioned to intervene and be heard.

On the morning of February 28, 1958 the City obtained title to the Lincoln Square site by order of condemnation. While the amount to be paid by condemnation awards had not yet been fixed by the Supreme Court of the State of New York, the approximate cost of site acquisition, as estimated by the Committee on Slum Clearance is $16.00 per square foot. On the afternoon of February 28, 1958 the designated sites were auctioned subject to the foregoing "re-use" restrictions. The only bidders were the designated sponsors. The amounts bid were the minimum prices previously established by the sponsorship agreements. (20a, 37a, 54a) It could hardly have been otherwise, for the City was well aware that Fordham University and Lincoln Center for the Performing Arts, Inc. were the only conceivable bidders who could use the sites as restricted. (42a-43a)

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[3] In every Title I project in the City of New York, including the Lincoln Square project, the "public auction" requirements of Section 72-k of the New York General Municipal Law have been demonstrated to be idle form. The only purchasers at "public auction" have been the previously designated sponsors. The price bid has been the previously negotiated price. In fact, no bid has ever been submitted by any other than the designated sponsor. (50a-53a)

Fordham University is conducted by members of the Society of Jesus, a religious order of the Roman Catholic Church, and while enrollment is not limited to students of the Roman Catholic faith, a complete program of religious education and indoctrination in that faith is conducted. (34a, 38a)

C. Court Proceedings

The complaint in this action was filed on June 16, 1958 with the Clerk of the United States District Court for the Southern District of New York. The summons and complaint was served upon all defendants between June 17, 1958 and June 20, 1958.

Thereafter, the defendants moved to dismiss the complaint and for summary judgment and plaintiffs moved for a preliminary injunction. On August 5, 1958 the opinion of the District Judge (Dimock, J.) granting defendants' motions to dismiss the complaint and for summary judgment and denying plaintiffs' motion for a preliminary injunction, and judgment was entered accordingly on that day.

On August 28, 1958 plaintiffs filed a notice of appeal from the order and judgment of the District Court, and on January 16, 1959, the Court of Appeals for the Second Circuit rendered its opinion and judgment affirming the order and judgment of the District Court.

On February 11, 1959, an order was made and filed making the judgment of the Court of Appeals, the judgment of the District Court.

Federal jurisdiction in the court of first instance was based upon §§ 1331, 2201 and 2202 of Title 28, U.S.C.; § 1456(c)(1) of Title 42, U.S.C.; § 1009 of Title 5, U.S.C.; and upon the First, Fifth and Fourteenth Amendments to the Constitution of the United States and on Articles I and III thereof.

Reasons for Granting the Writ

The issues which this Court is asked to decide have not been settled by the Court and are fundamental to the present and future implementation of the "Housing Act of 1949", 63 Stat. 413, as amended, 42 U.S.C. §§ 1441 et seq., and the operation of the Act within a statutory and constitutional framework.

The decision of the Court of Appeals permits federal sanction to be granted and federal funds to be used for the benefit of an admittedly sectarian institution in violation of the First Amendment to the Constitution of the United States. Moreover, the Court of Appeals has reached this result by holding that petitioners are barred from litigating in the federal courts, a cause of action against a federal official, arising solely under a statute and the Constitution of the United States, because of a prior state court decision which passed upon issues involving the same Constitutional provision and its effect upon the action of state officials. The Court of Appeals arrived at this holding notwithstanding the fact that the federal official was not and could not have been made a party to the state court litigation, and that the question regarding the use of federal funds was not and could not have been raised in the state courts.

Wholly independent of the question of First Amendment prohibitions, the Court of Appeals decision would permit the frustration of Congressional intent and the denial of "due process of law" in the increasingly important area of slum clearance and urban redevelopment. For while the Congress has been zealous in enacting legislation which is protective of the rights of persons who are displaced by federally supported urban renewal, and has provided minimal relocation requirements as a prerequisite to federal approval and support of urban renewal projects, the Federal Housing Administrator's refusal to hear rep-

resentatives of the protected tenant class with respect to the adequacy of a locally formulated relocation plan, has effectively stripped the protected class of its protection. The denial of an opportunity to intervene and be heard was in violation of Title I of the Housing Act of 1949, as amended, Section 5 of the Administrative Procedure Act of 1946, 60 Stat. 239, 5 U.S.C. § 1004, and the "due process" clause of the Fifth Amendment to the Constitution of the United States.

I

The Court of Appeals has decided federal questions of substance not heretofore determined by this Court or in a way in conflict with applicable decisions of this Court.

A. The question arising under the "establishment of religion" clause of the First Amendment.

Under Title I of the Housing Act of 1949, 63 Stat. 413, as amended, 42 U.S.C. § 1441 *et seq.*, Congress attempted to meet the problem of slum clearance by subsidizing the cost of clearing blighted or deteriorating land in central areas of the Nation's major cities on a two-to-one sharing formula, "the Federal Government making up two-thirds of the loss and the local government making up one-third." *S. Rep. No. 84 on S. 110*, 81st Cong., 1st Sess., at p. 13 (1949). The purpose of "Title I" was to subsidize and encourage private enterprise to clear and redevelop slum areas.[4]

At issue in this case is the question of whether the predetermination of Fordham University's participation as a redeveloper and the certitude that it would receive

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[4] *S. Rep. No. 84 on S. 110*, 81st Cong., 1 Sess. pp. 10-15 (1949); *H. Rep. No. 590 on H. R. 4009*, 81st Cong., 1st Sess., pp. 13-17 (1949); *S. Rep. No. 1472 on H. R. 7839*, 83rd Cong., 2d Sess., pp. 35-41 (1954); *H. Rep. No. 1429, on H. R. 7839*, 83rd Cong., 2d Sess., pp. 22-25 (1954).

aid and benefit by reason of such participation, both of which were implicit in the Lincoln Square Urban Renewal Plan, would preclude federal approval of that plan and the use of federal funds for its implementation.

Petitioners contend that in this factual context, the actions of the Federal Housing Administrator in approving the Lincoln Square Urban Renewal Project and executing the capital grant contract were prohibited by the First Amendment to the Constitution of the United States.

While the decision of the Court of Appeals for the Second Circuit did not directly hold that such action was valid, it did adopt the opinion of the New York Court of Appeals which dealt with First Amendment prohibitions upon officials of the City of New York who were furthering the Lincoln Square Project,[5] but the Federal Housing Administrator was not and could not have made a party to the state court litigation, nor would the state court pass upon actions of the Fordham Administrator. See, *Hunter* v *City of New York*, 121 N. Y. 2d 841.

The proposition that federal funds cannot be used to support religious activities or institutions is not subject to question or doubt. Cf. *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, 333 U. S. 203; *Zorach* v. *Clauson*, 343 U. S. 306.

The Lincoln Square Urban Renewal Plan, and the reuse restrictions contained within that plan, were adopted for the specific purposes of the redevelopment sponsors including Fordham University, and while the plan required a "public auction" before Fordham could take title to the property, it was factually apparent that such an auction was an empty gesture, devoid of significance. While it was legally possible for other bidders who might have been interested in erecting a vast educational institution or an opera house and concert hall to appear at the public auction

[5] See footnote 2, *supra*.

and enter higher bids, such a possibility was precluded as effectively as if the City of New York had declared all bidders ineligible, other than the designated sponsors.

Here, where the provisions of the plan and the sponsorship contract provided for the sale of an educational site to Fordham University for a sum about 3½ million dollars less than its cost of acquisition (two-thirds of which is payable by the federal government) and land use restrictions which lowered the land value were adopted with Fordham University—and only Fordham University—in mind and in contemplation, federal support and approval were prohibited by principles of separation of church and state based upon the "establishment of religion" clause of the First Amendment.

Vast amounts of federal monies are being and will be expended in subsidy of urban renewal programs. Petitioners do not believe that the question presented has ever been settled by this Court unless that portion of the opinion in *Berman* v. *Parker*, 348 U. S. 26, 34-35, which states that it was within the power of Congress to authorize the District of Columbia Land Redevelopment Agency to attack the problem of Slum Clearance on an area or regional basis and to redesign the area "so that a balanced integrated plan could be developed for the region, including not only new houses but also schools, churches, parks, streets and shopping centers", may be taken to mean that churches (and other religious institutions) may participate as urban redevelopers, and pay less than market value, or even nothing, for the land which they redevelop.

B. The Question Involving An Opportunity to be Heard and Present Testimony in Support of the Objections to the Relocation Plan.

The Court of Appeals held that "[petitioners] do have standing in this action to challenge the Administrator's refusal to grant them an oral hearing on the feasibility

of the City's relocation plan". But having so held, the Court went on to say, "there is no basis, statutory or otherwise, for the right to appear and be heard before the Administrator which [petitioners] claim," and that the receipt of the petition by the Federal Housing and Home Finance Agency was all that the Housing Act required.

While it is true that the Housing Act specifies only a hearing before a local public agency,[6] the municipalities which propose an urban renewal project are normally so zealous in their efforts to improve the urban vista, that their relocation plans are inadequately formulated and are adopted without evidence of compliance to the minimal statutory standards. Experience has shown that such plans have not been and cannot be implemented, and it may truly be said that slum clearance today is but slum transference.

The relocation requirement that there be decent, safe, and sanitary dwellings equal in number to and available to displaced families which are not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families displaced from the urban renewal area,[7] has been totally disregarded by both the local public agency and the Federal Housing Administration.[8]

Here petitioners Schuckman Press, Inc. and Howdibon Garage Co., Inc., along with the residential tenants who

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[6] Title I § 105, 63 Stat. 416, as amended, 42 U. S. C. § 1455(d).

[7] Title I § 105, 63 Stat. 416, as amended, 42 U. S. C. § 1455(c).

[8] *Note: Urban Renewal: Problems of Eliminating Slums and Preventing Urban Deterioration, 72 Harvard Law Review 504, 515,* suggesting that the failure of local hearings to be more effective may be attributable in part to unwillingness of administrators to modify a course of action once adopted, especially since hearings are usually held at a late stage in the progress of the plan and that generally there is no right of cross-examination at local hearings but only one of rebuttal.

sought to intervene and be heard by the Federal Agency "on behalf of themselves and all others similarly situated," sharply contested the City's relocation evidence. Since the Federal Housing Administrator denied these tenants an opportunity to demonstrate that the City's findings and documentation were spurious, he stripped the protected class of its only real protection and barred it from its only avenue of redress.

While the Circuit Court held that petitioners had standing to sue, and based this determination upon the statutory protection enacted specifically for the benefit of the tenant class, the Court then proceeded to create the curious anomaly that although there was standing to sue in the courts, there was no standing to effectively pursue an administrative remedy prior to resort to the courts.

Section 5 of the Administrative Procedure Act of 1946 requires "notice and hearing" in every case of "adjudication required to be made upon the record after opportunity for agency hearing." 60 Stat. 239, 5 U. S. C. § 1004. In *Cates* v. *Haderlein*, 342 U. S. 804, reversing (7 Cir.), 189 F. 2d 369, the Supreme Court held that a determination under statutes permitting the Postmaster General to issue fraud orders "upon evidence satisfactory to him," 39 U. S. C. §§ 259, 732, was an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." In *Riss & Co.* v. *United States*, 341 U. S. 907, reversing (D. C., Mo.), 96 F. Supp. 452, it held that a determination under Section 207(a) of the Interstate Commerce Act, 49 U. S. C. § 307, authorizing an issuance of a certificate of public convenience and necessity "to any qualified [motor carrier] if it is found that the applicant is fit, willing and able to properly perform the service proposed * * *" was an "adjudication required to be made upon the record after opportunity for agency hearing." And in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, a determination of deportability under Section 19(a)

of the Immigration Act of 1917, 39 Stat. 874, 8 U. S. C. § 155(a), which provided that "any alien who shall have entered or who shall be found in the United States in violation of this Act * * * shall upon the warrant of the Attorney General be taken into custody and deported," was held to be an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." Accordingly, we think it clear that the Administrator's determination under Section 101(c) of the Housing Act of 1949, which prohibits the making of federal loans or grants unless "on the basis of his review * * * the Administrator determines that [the Project], meets the requirement of this subsection * * *," 63 Stat. 414, 42 U. S. C. § 1451(c), was also an "adjudication required by Statute to be determined on the record after opportunity for an agency hearing." Cf. *Door* v. *Donaldson* (D. C. Cir.), 195 F. 2d 764, 765-766.

The Court of Appeals nevertheless held that because the number of residents affected by the Lincoln Square Project was large, the determination was not such an adjudication of individual interests as might justify the implied application of Section 5 of the Administrative Procedure Act. We think that such a conclusion begs the question, and must lead to the absurd result that when only five residents are to be relocated under a particular Title I project, there is a right to a plenary hearing, but where five thousand are so affected, a hearing must be denied. Here the impact is not upon a group, but upon an aggregation of individuals each one of whom may separately claim his right and his protection.

Moreover, the Administrator's sole reliance on the challenged findings and documentation submitted by the City was arbitrary in the very sense of the holding in *ICC* v. *Louisville & N.R. Co.*, 227 U. S. 88, where the Supreme Court said: "A finding without evidence is arbitrary and baseless * * * It would mean that where rights depended

upon facts [the Administrator] could disregard [them] * * * and capriciously make findings by administrative fiat. Such authority * * * is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power." *Id.*, at page 91. Inherent in the determination which the statute required the Administrator alone to make was the "process of reasoning". *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 136. Yet, when he refused to hear the evidence proffered by the residential and business tenants in the area, accepting instead the findings of the New York City Planning Commission, he engaged in no "process of reasoning," he simply adopted the reasoning supplied him by the local public agency. Such action was patently arbitrary and capricious. See, *Accardi* v. *Shaughnessy*, 347 U. S. 260; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 287-289; *Gonzales* v. *United States*, 348 U. S. 407, 412-416; *Kutcher* v. *Gray* (D. C. Cir.), 199 F. 2d 783, 787-788; *Shachtman* v. *Dulles* (D. C. Cir.), 225 F. 2d 938, 943-944.

The Federal Administrator's denial of the petition to "intervene and be heard" and his subsequent approval of the project stripped plaintiffs of the relocation safeguards enacted for their benefit in Section 105(c) of the Act, 63 Stat. 416, 42 U.S.C. § 1445(c), and as a practical result,

> "required [the tenants either] * * * to move themselves and their possessions to another abode, which might be difficult or impossible to obtain, or undertake defense of eviction proceedings in a state court, which proceedings, but for the [Administrator's] approval, would have been barred under the Act." *Parker* v. *Fleming*, 329 U. S. 531, 537-538.

In these circumstances, his action in approving the project and in denying petitioners an opportunity to be heard and to present testimony was arbitrary and capricious and constituted a violation of either Section 5 of the

Administrative Procedure Act of 1946 or the basic elements of "due process of law." See, *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

CONCLUSION

The fundamental importance of this case is heightened by the fact that hundreds of families have already been evicted from the Lincoln Square Urban Renewal Area without relocation to decent, safe and sanitary dwellings within their financial means, and that thousands more will meet a similar fate.

At issue are the questions of the participation of religious organizations as the recipients of federal largess through federal contributions to urban renewal as well as the rights of those who are being relentlessly removed from their homes by urban renewal.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRIS L. PRESENT, Esq.,
375 Park Avenue,
New York, New York,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & FRIEDMAN,
350 Fifth Avenue,
New York, New York,
Of Counsel.

APPENDIX "A"

Constitution

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statutes

Section 2 of the Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1441.

"The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the devel-

opment of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid * * *. The Housing and Home Finance Agency and its constituent agencies, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist * * * (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities * * *."

Title I, Section 100 of the Housing Act of 1949, as amended, 68 Stat. 622, 42 U.S.C. § 1450.

"The authorizations, funds, and appropriations available pursuant to sections 1452 and 1453 of this title shall constitute a fund, to be known as the 'Urban Renewal Fund,' and shall be available for advances, loans, and capital grants to local public agencies for urban renewal projects in accordance with the provisions of this subchapter * * *."

Appendix "A"

Title I, Section 101 of the Housing Act of 1949, 63 Stat. 414, as amended, 42 U. S. C. § 1451.

"(a) In entering into any contract for advances for surveys, plans and other preliminary work for projects under this subchapter, the Administrator shall give consideration to the extent to which appropriate local public bodies have undertaken positive programs (through the adoption, modernization, administration, and enforcement of housing, zoning, building and other local laws, codes and regulations relating to land use and adequate standards of health, sanitation, and safety for buildings, including the use and occupancy of dwellings) for (1) preventing the spread of recurrence in the community of slums and blighted areas, and (2) encouraging housing cost reductions through the use of appropriate new materials, techniques, and methods in land and residential planning, design, and construction, the increase of efficiency in residential construction, and the elimination of restrictive practices which unnecessarily increase housing costs.

"(b) In the administration of this subchapter, the Administrator shall encourage the operations of such local public agencies as are established on a State, or regional (within a State), or unified metropolitan basis or as are established on such other basis as permits such agencies to contribute effectively toward the solution of community development or redevelopment problems on a State, or regional (within a State), or unified metropolitan basis.

"(c) No contract shall be entered into for any loan or capital grant under this subchapter • • • unless (1) there is presented to the Administrator by the locality a workable program (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neigh-

borhoods of decent homes and suitable living environment for adequate family life) for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program, and (2) on the basis of his review of such program, the Administrator determines that such program meets the requirements of this subsection and certifies to the constituent agencies affected that the Federal assistance may be made available in such community. . . ."

Title I, Section 102 of the Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1452.

"(a) To assist local communities in the elimination of slums and blighted or deteriorated or deteriorating areas, in preventing the spread of slums, blight or deterioration, and in providing maximum opportunity for the redevelopment, rehabilitation, and conservation of such areas by private enterprise, the Administrator may make temporary and definitive loans to local public agencies in accordance with the provisions of this subchapter for the undertaking of urban renewal projects. . . .

"(d) The Administrator may make advances of funds to local public agencies for surveys of urban areas to determine whether the undertaking of urban renewal projects therein may be feasible and for surveys and plans for urban renewal projects which may be assisted under this subchapter, including, but not limited to, (i) plans for carrying out a program of voluntary repair and rehabilitation of buildings and improvements, (ii) plans for the

enforcement of State and local laws, codes and regulations relating to the use of land and the use and occupancy of buildings and improvements, and to the compulsory repair, rehabilitation, demolition, or removal of buildings and improvements, and (iii) appraisals, title searches, and other preliminary work necessary to prepare for the acquisition of land in connection with the undertaking of such projects. * * *"

Title I, Section 105 of the Housing Act of 1949, 63 Stat. 416, as amended, 42 U.S.C. § 1455.

"Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

"(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise; and (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole;

"(b) When real property acquired or held by the local public agency in connection with the project is sold or leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; (ii) to begin within a reasonable time any improvements on such property required by the urban renewal plan; and (iii) to comply with such other conditions as the Admin-

istrator finds, prior to the execution of the contract for loan or capital grant pursuant to this subchapter, are necessary to carry out the purposes of this title * * *;

"(c) There be a feasible method for the temporary relocation of families displaced from the urban renewal area, and that there are or are being provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families displaced from the urban renewal area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced families and reasonably accessible to their places of employment.

"(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing."

Title I. Section 110 of the Housing Act of 1949, 63 Stat. 420, as amended, 42 U.S.C. § 1460.

"(a) 'Urban renewal area' means a slum area or a blighted deteriorated, or deteriorating area in the locality involved which the Administrator approves as appropriate for an urban renewal project.

"(b) 'Urban renewal plan' means a plan, as it exists from time to time, for an urban renewal project, which plan (1) shall conform to the general plan of the locality as a whole and the workable program referred to in section 1451 of this title and shall be consistent with definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (2) shall be sufficiently complete to indicate such

land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, and building requirements.

"(c) 'Urban renewal project' or 'project' may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with such urban renewal plan. Such undertakings and activities may include—

(1) acquisition of (i) a slum area or a deteriorated or deteriorating area, or (ii) land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests the sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominantly residential uses: *Provided*, That the requirement in paragraph (a) of this section that the area be a slum area or a blighted, deteriorated or deteriorating area shall not be applicable in the case of an open land project;

(2) demolition and removal of buildings and improvements;

(3) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out in the urban renewal area the urban renewal objectives of this subchapter in accordance with the urban renewal plan;

(4) disposition of any property acquired in the urban renewal area (including sale, initial leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan; • • •

(6) acquisition of any other real property in the urban renewal area where necessary to eliminate unhealthful, insanitary or unsafe conditions, • • • or otherwise to remove or prevent the spread of blight or deterioration, or to provide land for needed public facilities. • • •

• • •

"In addition to all other powers hereunder vested, where land within the purview of clause (1) (ii) or (1) (iii) of the first paragraph of this subsection (whether it be predominantly residential or nonresidential in character) is to be redeveloped for predominantly nonresidential uses, loans and advances under this subchapter may be extended therefor if the governing body of the local public agency determines that such redevelopment for predominantly nonresidential uses is necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives and to afford maximum opportunity for the redevelopment of the project area by private enterprise; • • •."

Section 5, Administrative Procedure Act of 1946, 60, Stat. 239, 5 U. S. C. § 1004.

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, • • •

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under

which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

"(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party or any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency . . .

"(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

APPENDIX "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 184—October Term, 1958.

(Argued December 8, 1958 Decided January 16, 1959.)

Docket No. 25358

WILLIAM GART, *et al.*,
Plaintiffs-Appellants.

—v.—

ALBERT M. COLE, *et al.*,
Defendants-Appellees.

Before:

CLARK, *Chief Judge*, and
HINCKS and LUMBARD, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge*.

Plaintiffs, property owners and residential and business tenants in the vicinity of the Lincoln Square Urban Renewal Project in New York City, appeal from a summary judgment for defendants, D. C. S. D. N. Y., 166 F. Supp. 129, which dismissed their action against various federal and city officials and parties in interest to enjoin the execution of the Project on the ground of its asserted invalidity. Affirmed.

Appendix "B"

DAVID I. SHAPIRO, of Dickstein, Shapiro & Friedman, New York City (Harris L. Present, New York City, and Sidney Dickstein and Arthur J. Galligan, of Dickstein, Shapiro & Friedman, New York City, on the brief), *for appellants.*

MORTON S. ROBSON, Asst. U. S. Atty., S. D. N. Y., New York City (Arthur H. Christy, U. S. Atty., and John A. Guzzetta, Asst. U. S. Atty., New York City, on the brief), *for appellees Albert M. Cole and Walter S. Fried,*

ANTHONY CURRERI, New York City (Charles H. Tenney, Corp. Counsel, City of New York, and Leo A. Larkin, Pauline K. Berger, and Benjamin Offner, New York City, on the brief), *for appellees City of New York, Robert F. Wagner, et al.*

EDWARD D. BURNS, of Saxe, Bacon & O'Shea, New York City (Porter R. Chandler and William R. Meagher, New York City, and Martin Fogelman, of Saxe, Bacon & O'Shea, New York City, on the brief), *for appellee Fordham University.*

WILLIAM ELDRED JACKSON, of Milbank, Tweed, Hope & Hadley, New York City (Rebecca M. Cutler, of Milbank, Tweed, Hope & Hadley, New York City, on the brief), *for appellee Lincoln Center for the Performing Arts, Inc.*

ROSENMAN, GOLDMARK, COLIN & KAYE, New York City, *for appellee Webb & Knapp Lincoln Square Corp.*

Appendix "B"

CLARK, *Chief Judge*:

This is the fifth of a prolonged series of actions attacking the validity of the Lincoln Square Urban Renewal Project, a slum redevelopment project of the City of New York partially financed by federal funds under Title I of the Housing Act of 1949, 42 U. S. C. §§ 1441 *et seq.* Appellants, property owners and residential and business tenants in the Project area, instituted this action as individuals and on behalf of all others similarly situated just seven days after the Supreme Court denied certiorari in *64th Street Residences* v. *City of New York*, 4 N. Y. 2d 268, 150 N. E. 2d 396, certiorari denied *Harris* v. *City of New York*, 357 U. S. 907, the first of the previous actions to proceed to final judgment on the merits.[1] Although none of the appellants were named as parties plaintiff in that action, all are members of the classes there represented. And appellees here, with the exception of Albert M. Cole, sued as Administrator of the Federal Housing and Home Finance Agency, and Walter S. Fried, sued as Regional Administrator of that agency, were defendants in the *64th Street Residences* case. This appeal questions the district court's denial of appellants' motion for temporary injunction and entry of summary judgment in favor of all of the appellees. In a reasoned opinion, D. C. S. D. N. Y., 166 F. Supp. 129, the court below held appellants' claims against all but the FHHFA officials barred by the judgment in the *64th Street*

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[1] Two actions, instituted in the Supreme Court of New York, before the New York City Board of Estimate approved the Project, were dismissed as premature. *Loebner* v. *City of New York*, S. Ct., 162 N. Y. S. 2d 233; *89 Amsterdam Ave. Corp* v. *City of New York*, S. Ct., N. Y. County, N. Y. L. J., Nov. 13, 1957, p. 7. During the pendency of the appeal in the *64th Street Residences* case a fourth action was instituted in the court below. *Cohen* v. *City of New York*, D. C. S. D. N. Y., Civ. No. 130-164. Stayed pending final determination of the state case, it was dismissed by Judge Dimock on the same date that he dismissed the complaint herein. D. C. S. D. N. Y., N. Y. L. J., Aug. 7, 1958, p. 7.

Residences case and found no validity in the claims against those officials.

There is no dispute here that the claims asserted in this action against defendants other than Cole and Fried are identical with those unsuccessfully raised against these same parties in the prior New York action. In both suits the Project was attacked on the grounds that Fordham University's participation as a Project sponsor violated the principle of separation of church and state, as embodied in the First Amendment to the United States Constitution and made applicable to the City through the Fourteenth Amendment, and that the City's negotiation of minimum bids to be made by the sponsors at a subsequent public auction was unlawful. As members of the classes of plaintiffs represented in the *64th Street Residences* case, appellants are barred by the judgment there from relitigating these issues with these defendants in the New York courts. *Ashton* v. *City of Rochester*, 133 N. Y. 187, 195, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619; *People's Gas & Elec. Co. of Oswego* v. *City of Oswego*, 207 App. Div. 134, 202 N. Y. S. 243, affirmed 238 N. Y. 606, 144 N. E. 911; *Campbell* v. *Nassau County*, 192 Misc. 821, 82 N. Y. S. 2d 179, affirmed 274 App. Div. 929, 83 N. Y. S. 2d 511. And the full-faith-and-credit clause requires a federal court to give equal effect to that judgment as a bar to relitigation of these issues. *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 86 A. L. R. 298; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 150 A. L. R. 413. See also *McIntosh* v. *City of Pittsburgh*, C. C. W. D. Pa., 112 Fed. 705.[2]

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[2] *Howard* v. *Ladner*, D. C. S. D. Miss., 116 F. Supp. 783, vacated *White* v. *Howard*, 347 U. S. 910, appears in error in the suggestion that F. R. 23(a)(1), rather than the full-faith-and-credit and due-process clauses of the Constitution, governs any question of federal limitation on the effect of the state judgment as *res judicata*. Neither the Federal Rules of Civil Procedure nor cases interpreting them, such as *Dickinson* v. *Burnham*, 2 Cir., 197 F. 2d 973, certiorari denied 344 U. S. 875, show any intent (even were it permissible) to place limits on state procedure.

Appendix "B"

It is to be noted that the very holding in *American Surety Co.* v. *Baldwin, supra*, 287 U. S. 156, 86 A. L. R. 298, negates the strained inference appellants draw from *Angel* v. *Bullington*, 330 U. S. 183, that a state court decision has less than its usual effect as *res judicata* where constitutional questions were decided and no appeal of right to the Supreme Court was available. Nor did the Sixth Circuit, as appellants suggest from their reading of *Trailmobile Co.* v. *Whirls*, 6 Cir., 154 F. 2d 866 (reversed on other grounds in 331 U. S. 40), render all state court decisions on questions of federal law a nullity in the federal courts. The court's statement, 154 F. 2d 866, 871, that "The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts" properly relates only to the impact of a state decision as *stare decisis*, not as *res judicata*—a distinct question which the court there correctly answered with its holding that the plaintiff had been neither party nor privy to the state court's judgment.

Nor is there valid constitutional objection to holding appellants bound by the *64th Street Residences* judgment. All had ample notice of the suit; parties plaintiff there had no interests contrary to appellants in this action; and the same counsel prosecuted both suits. To the general rule that only persons subject to a court's jurisdiction are bound by its judgment, there has long been an exception for suits of a representative character. *Smith* v. *Swormstedt*, 57 U. S. 288, 16 How. 288; *Gibbs* v. *Buck*, 307 U. S. 66; *Hansberry* v. *Lee*, 311 U. S. 32, 132 A. L. R. 741. True, the courts in practice have narrowly delimited this exception lest persons be improperly denied their day in court. But this in federal procedure has been more a decision as to proper rule-making than an application of constitutional principle.

Thus under the Federal Rules the legal development has been that, except for the disposition of specific property,

only judgments in action under F. R. 23(a)(1)—the so-called "real" class actions—are binding on members of the classes represented who are not parties. See, e.g., *Dickinson* v. *Burnham*, 2 Cir., 197 F. 2d 973, 979, certiorari denied 344 U. S. 875; *Oppenheimer* v. *F. J. Young & Co.*, 2 Cir., 144 F. 2d 387, 390. As the *Dickinson* case points out, this view has been criticized, notably by text writers, as not going to the extent permitted by constitutional due process. For the Constitution requires at most only that "for any * * * reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." *Hansberry* v. *Lee, supra*, 311 U. S. 32, 43. Also of paramount relevance is the well-known suggestion of Chief Justice Stone in this case that a judgment may be constitutionally based on notice alone. 311 U. S. 32, 40. But, beyond all this, the *64th Street Residences* judgment was in an action typically "real"; and we see no reason to think that it would not have been binding, whatever its origin. See 3 Moore's Federal Practice ¶23.11, at n. 5 (2d Ed. 1948), and authorities there cited; and see generally cases collected in the annotations in 20 A. L. R. 1133 and 64 A. L. R. 1262.

There remains to be considered the dismissal of the claims against appellees Cole and Fried, the Administrator and Regional Administrator of the FHHFA. Appellants asserted basically three claims against them: (1) that the FHHFA's participation in the Lincoln Square Urban Renewal Project constitutes an unconstitutional subsidy to a religious institution; (2) that the sale by the City of portions of the Project area to sponsors at negotiated minimum bids was a failure to comply with §§ 106(c)(7) and 110(c)(4) of the Housing Act of 1949, 42 U. S. C. §§ 1456(c)(7), 1460(c)(4); and (3) that the Administrator illegally denied various residential tenants, including some appellants, an oral hearing in which to challenge the feasibility of the

City's relocation plan. The first claim but repeats the one so strongly asserted against the City and the Project sponsors in the state case. The First Amendment's requirement of the separation of church and state applies equally to the state and the Federal Government. *Zorach* v. *Clauson*, 343 U. S. 306, 309; *Everson* v. *Board of Ed. of Ewing Township*, 330 U. S. 1, 15, 168 A. L. R. 1392; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, 128 A. L. R. 1352. As to both governments, the basic issue concerns the transaction between the City and Fordham University. Moreover, the City's use of federal funds was considered by the New York Court of Appeals in its opinion in *64th Street Residences* and was heavily stressed by the plaintiffs there in the petition for certiorari. And as a practical matter, the relief appellants seek in this action against the FHHFA will curtail the progress of the Lincoln Square Urban Renewal Project as effectively as the direct injunctive relief against the active Project participants unsuccessfully sought in the New York courts. These appellees have once successfully litigated this issue to a final judgment. In these circumstances there can be no doubt but that the New York courts would not permit this relitigation of the same issue. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97; *Good Health Dairy Products Corp. of Rochester, N. Y.* v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758, 112 A. L. R. 401. See also *Kessler* v. *Eldred*, 206 U. S. 285. Hence it is barred here.

Inasmuch as the remaining claims against the FHHFA were not and could not have been litigated in the *64th Street Residences* action, see 4 N. Y. 2d 268, 276-277, 150 N. E. 2d 396, they are not barred by the judgment therein. Moreover, the district court correctly ruled that it had sufficient jurisdiction over the officers of the FHHFA to consider these claims. As the Supreme Court has noted, the determination of the proper party defendant for review or challenge of administrative action is a matter "compounded of

confusion and artificialities." *Snyder* v. *Buck*, 340 U. S. 15, 22. The opinion of the court below seems admirably to reduce the unavoidable formality here to a considerable extent. In his carefully reasoned opinion Judge Dimock held that a suit against Cole, in his capacity of Administrator was in actuality brought against the FHHFA, and that adequacy of service of process should be determined as with suits against corporations, rather than those against individuals. Accordingly, service on Fried, the Regional Administrator of the FHHFA, at his office in New York where the agency was "doing business" was deemed sufficient to give the court jurisdiction over all indispensable parties. There is some support for this view, principally among the more recent decisions. See authorities cited 166 F. Supp. 129, 133. And there is considerable merit in its recognition that suits such as this are against an agency rather than an individual. See 3 Davis, Administrative Law Treatise § 27.07 (1958). But there is no need to adopt that reasoning definitively here. For the identic result is firmly grounded in authority. Whether personal service on Cole is indispensable turns on essentially "practical considerations." *Shaughnessy* v. *Pedreiro*, 349 U. S. 48. Here all the underlying facts of the action are peculiarly local, and this case's resolution will have a predominantly local impact. Moreover, plaintiffs seek merely to restrain official action, not to compel an official to take some action for their benefit. In such a case service on the official sought to be enjoined—here Fried—is all that is required. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 96-97; *Williams* v. *Fanning*, 332 U. S. 490. Without denying that Fried is presently authorized to pay the funds to the City, the FHHFA contends that Cole is indispensable to this litigation because he has power to appoint another official to dispense these funds. We cannot assume, however, that the Administrator would so lightly disregard the decision of this court. *Shaughnessy* v.

Pedreira, supra, 349 U. S. 48, 53. And see *Sunshine Anthracite Co.* v. *Adkins*, 310 U. S. 381, 402-403. *Heyward* v. *Public Housing Administration*, 5 Cir., 238 F. 2d 689, does not support the FHHFA's contentions here, for in that case the local officer defendant established as a fact that he was not then authorized to handle the disbursements sought to be enjoined.

Little can be added to Judge Dimock's careful discussion of appellants' claims against the FHHFA. Appellants find standing to assert these claims in § 10(a) of the Administrative Procedure Act, 5 U. S. C. § 1009(a). This section leans heavily on existing law, since its requirements, that the person seeking review have suffered "legal wrong" or have been "adversely affected or aggrieved by such action within the meaning of any relevant statute," have well established meanings. See *Kansas City Power & Light Co.* v. *McKay*, D. C. Cir., 225 F. 2d 924, 931-932, certiorari denied 350 U. S. 884. Appellants clearly have no standing to assert that the City's sponsorship agreements violate the Housing Act's alleged requirement of open bidding on all property sold as part of the Project. Assuming that such a requirement may be read into 42 U. S. C. §§ 1456(c)(7) and 1460 (c)(4), these sections seem designed to protect not the interests of landowners or tenants in a redevelopment area, but those of the public at large. Appellants cannot challenge this expenditure of funds as representatives of so broad an interest. *Massachusetts* v. *Mellon*, 262 U. S. 447. See also *Allied-City Wide, Inc.*, v. *Cole*, D. C. Cir., 230 F. 2d 827.

Plaintiffs do have standing in this action to challenge the Administrator's refusal to grant them an oral hearing on the feasibility of the City's relocation plan. But there is no basis, statutory or otherwise, for the right to appear and be heard before the Administrator which appellants claim. Appellants find this right in §101(c)(iv) of the Housing Act of 1949, 42 U. S. C. § 1451(c)(iv), which pro-

scribes delegation by the Administrator of his reviewing function. Unless residents are granted a hearing, they contend, the Administrator's determination can be based on only those facts which the city chooses to furnish him and is thus not an independent review of the relocation plan. But the Act expressly requires public hearings before the local authority actually engaged in formulating the relocation plan. In view of the necessarily limited utility of a second hearing before the Administrator, who is charged only with assuring this plan's compliance with minimum standards, lesser efforts by the Administrator would seem adequate. Here the FHHFA afforded appellants opportunity to submit documentary information on the plan's feasibility. More than this the Housing Act does not require. See §4(b) of the Administrative Procedure Act, 5 U. S. C. § 1003(b).

Appellants further contend that the nature of the matters reviewed and the impact upon appellants of the Administrator's approval of the relocation plan render his review "a case of adjudication required by statute to be determined upon the record after opportunity for agency hearing" within the scope of §5 of the Administrative Procedure Act, 5 U. S. C. § 1004. Since no express requirement of an open adjudicative hearing is contained in the Housing Act, appellants necessarily rely upon the implication of such a requirement from the nature and effect of the determination to be made. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. But here the purpose of the proceeding is to determine the compliance with federal standards of a general plan for the relocation not of individuals, but of a group within a geographically defined area. The impact of the determination is upon the group, not upon individuals, and, as would normally be the case in Title I proceedings, the number of residents affected by the relocation proposals and therefore within the group is quite large. Compare *Londoner* v. *City and County of Denver*, 210 U. S. 373, with *Bi Metallic*

Inv. Co. v. *State Board of Equalization*, 239 U. S. 441. In such a case the determination is not such an adjudication of individual interests as may justify the implied application of § 5 of the Administrative Procedure Act, 5 U. S. C. § 1004. The Administrator's review of the proposal for relocation here lacks the direct impact of the deportation of an alien in *Wong Yang Sung* v. *McGrath*, *supra*, 339 U. S. 33, or the denial of a certificate of public convenience to a public carrier in *Riss & Co.* v. *United States*, 341 U. S. 907, or the denial of an individual citizen's right to use the mails in *Cates* v. *Haderlein*, 342 U. S. 804, and *Door* v. *Donaldson*, D. C. Cir., 195 F. 2d 764—cases on which appellants rely. Thus this review is not a "case of adjudication" within the quoted words of § 5 of the Administrative Procedure Act, 5 U. S. C. § 1004.

At times appellants seem to assert that the Administrator did in fact delegate his duty to review the feasibility of the Lincoln Square Urban Renewal Project's relocation provisions. As 42 U. S. C. § 1451(c)(iv) is in protection of the interests of displaced residents such as appellants, they have standing to raise this claim. But summary judgment was properly entered here, too; for appellants presented no proof whatsoever of such misconduct by the Administrator apart from the fact that they were refused an oral hearing.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM CARL, MAX BASS, HARRY MYERS, SOLOMON BERGMAN, GEORGE KAY d/b/a Lorie Press, WILLIAM LOURIE, HOWARDTON GARAGE CO. INC., SCHUCKMAN PRESS, INC., 145-147 WOOLSEY CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

against

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency, WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency, CITY OF NEW YORK, ROBERT F. WAGNER, individually as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York, FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESPONDENT

WILLIAM ELDRED JACKSON
15 Broad Street
New York 5, New York
Attorney for Lincoln Center for the Performing Arts, Inc., Respondent

REBECCA M. CUTLER
15 Broad Street
New York 5, N. Y.
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM GART, et al.,
Petitioners,

against

ALBERT M. COLE, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESPONDENT

Questions Presented

In this, the fifth class action on behalf of owners and tenants attacking the constitutionality of the Lincoln Square Urban Renewal Plan in the City of New York,[1] the record presents no substantial federal question. The questions raised by petitioners amount only to these:

1. Whether the "Establishment of Religion" clause of the First Amendment was violated by the

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[1] The prior actions are referred to in the opinion below (Appendix "B" to petition, p. 28a, footnote 1).

grant of federal funds to the city as part of the city's cost, where the city's condemnation, resale and other acts have been held constitutional by a prior judgment conceded to be *res judicata* as to the city and denied review by this Court.

2. Whether the federal administrator's determination under the Housing Act to grant federal funds to the city was such an "adjudication" of tenants' rights as to require him, either by reason of the "Due Process" clause of the Fifth Amendment or the Administrative Procedure Act, to grant to tenants a formal hearing not required by the Housing Act, where responsible city agencies did hold public hearings as required by the Act.

Statement

The petition (p. 3) purports to seek review of only that part of the judgment of the United States Court of Appeals for the Second Circuit entered January 16, 1959, which was rendered in favor of the federal officials, who were not parties to the prior action, *64th Street Residences Inc. et al.* v. *City of New York et al.*, 4 N. Y. 2d 268 (1958), *cert. denied sub nom. Harris et al.* v. *City of New York et al.*, 357 U. S. 907 (herein called the "*64th Street*" action).

On principles of *res judicata* the Court below held the *64th Street* judgment to bar further litigation of the issue as to "establishment of religion" both as against the city officials and private redevelopers, and as against the federal officials.

By the limited review sought, petitioners now concede for the first time that their claim of unconstitutionality against the city and redevelopers is *res judi-*

cata by virtue of the *64th Street* judgment. They nevertheless contend that the same claim remains open as against the federal officials.

The other allegations against the federal officials, based on lack of a formal hearing, were found by the Court below to be insufficient in law.

The Project, Condemnation, and Resale

The Lincoln Square Urban Renewal Project involves the clearance and redevelopment of an area duly found by the New York City Planning Commission—in a finding never challenged—to be substandard and insanitary (R. 92).[1]

After inviting preliminary bids the city obtained commitments from proposed redevelopers (called "sponsors") to make minimum bids at public auction sales of specified sites within the project area and to carry out the public purposes of slum clearance and redevelopment subject to reuse restrictions (R. 14, 15, 153, 166, 178, 61-4).

On November 12, 1956, eight tenants in the area (including two of these petitioners) on behalf of themselves and others similarly situated, represented by the same attorney who represents these petitioners, petitioned the Federal Housing and Home Finance Agency to "intervene" and be heard on their claims

[1] Page references preceded by "R." refer to the printed record in the New York Court of Appeals in the *64th Street* action, which was incorporated by reference in the record below (128a) and was before both the District Court and the Court of Appeals; that record is on file in this Court in connection with the petition for certiorari in *Harris et al. v. City of New York et al.*, 357 U. S. 907 (October Term, 1957, Docket No. 1014). Page references followed by "a" refer to the Appendix to Appellants' Brief as printed for the Court below.

that the project would increase the housing shortage, did not fulfill relocation requirements of the Housing Act, and violated the First and Fourteenth Amendments to the Constitution (63a-67a). By reply dated November 30, 1956, the Acting Urban Renewal Commissioner agreed that the petition and supporting memorandum of facts and law would be considered (68a-69a). Both previously and subsequently, the City Board of Estimate held public hearings on the project plan (R. 28-29; 18a, 36a), and at one such hearing appearances in opposition were made by various owners and tenants, including the president of one of these petitioners, and by petitioners' attorney (R. 151, 172, 175-6, 28; 32a, 36a). Subsequently the City Planning Commission also held public hearings on the plan (18a).

The Board of Estimate, acting upon consent and findings required by New York General Municipal Law, § 72-k, including its own finding that acquisition was in the interest of the city's health and welfare and effectuation of the statutory purpose of rehabilitation of a substandard area, authorized condemnation of sites comprising the project area (R. 92-99, 78-79). Pursuant to the Board's authorization (R. 102, 82, 39-40, 46), the city entered into (19a-20a): (1) contracts with sponsors obligating the sponsor to make a minimum bid at public auction for a specified site and the city to sell to the sponsor if the highest bidder; and (2) a capital grant contract with the federal government obligating the latter to contribute two-thirds of the difference between the city's cost of condemnation and the proceeds from resale (R. 62-4, 143-4, 90-91). The city then condemned the area (20a).

Pursuant to the Board of Estimate's separate resolution (R. 101), separate sites within the area were offered and sold at public auction, subject to specified reuse restrictions, to the American Red Cross, Webb & Knapp Lincoln Square Housing Corporation, and this respondent, Lincoln Center for the Performing Arts, Inc. (20a) (a non-profit, charitable corporation obligated under its sponsorship contract and deed to relocate tenants, clear the site, and construct a cultural center, including a new Metropolitan Opera house and Philharmonic-Symphony concert hall (R. 143-4)). The eligibility of these purchasers is unquestioned.

Another separate site was sold at public auction to Fordham University, a sectarian educational institution, subject to educational reuse restrictions (R. 62-3, 92-99, 105, 20a). While petitioners claim that the sale to Fordham involved a forbidden subsidy of public funds to a religious institution, the facts are that (1) Fordham's purchase price was greater than any of three different appraisals of the reuse value of the land, two of which were based on a use (housing) more valuable than the educational use (R. 129-31); and that (2) the sale was made at public auction for which bids were solicited and at which non-sectarian educational redevelopers were free to bid (R. 62-3, 166-171). Moreover, Fordham was obligated at its own expense to clear and redevelop the land according to the reuse requirements (R. 64).

The 64th Street Action

The action was brought in the New York Supreme Court by alleged property owners, suing under Section 51 of the New York General Municipal Law, and alleged residential and business tenants on behalf of

themselves and others similarly situated, represented by the same attorney as these petitioners. Named defendants were the city and various officials. These respondents, being sponsors, intervened as defendants (R. 143, 137, 2).

The complaint alleged in substance that city officials, processing a plan for redevelopment of the Lincoln Square area, were authorized to apply for federal aid under the Housing Act; that Fordham University, a Catholic school, had contracted with the city to bid a minimum price at public auction for the collegiate site; that Fordham was the only possible bidder for such site, which the city would acquire at a price substantially greater than Fordham's minimum bid; that the difference constituted a direct subsidy, and the city's condemnation an indirect subsidy, to Fordham; and that the city's alleged acts, including the condemnation, were "illegal, void and a taking of public property for a non-public use in violation of the Fourteenth Amendment,"[1] and the New York constitution (R. 10-22). The complaint sought a declaration of invalidity and an injunction prohibiting condemnation of the whole area (not merely the collegiate site) and further processing of the plan (R. 21-22).

Judgment of dismissal was unanimously affirmed by the Appellate Division (R. 217) and by the New York Court of Appeals. This Court denied a petition for *certiorari* on June 9, 1958 (357 U. S. 907).

Prior to the decision of the Court of Appeals the city condemned the area and resold portions at public auction (20a).

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[1] While the complaint mentioned only the Fourteenth Amendment, plaintiffs' arguments were based on the First Amendment as made applicable to the states by the Fourteenth.

The Present Action

Plaintiffs herein, like those in the *64th Street* action, are alleged owners or tenants in the area who again sue, through the same attorney, on behalf of themselves and all others similarly situated (9a). Defendants, in addition to those in the prior action, include two officials of the Federal Housing and Home Finance Agency.

The complaint alleges in substance the same claim as the *64th Street* complaint—i.e., that the project involves a subsidy of public funds to Fordham and is therefore contrary to the First and Fourteenth Amendments. The allegations of fact and legal theory are substantially identical, as appears from the city's tabular comparison of the complaints and papers in the 'two actions' (114a-116a).

While plaintiffs herein also claim denial of federal procedural due process or statutory right, because the Federal Housing and Home Finance Administrator refused a formal hearing, the relief sought is basically the same as that sought in the *64th Street* action, i. e., a declaration of invalidity and permanent injunctions (28a-30a; cf. R. 20-22).

The present action was not begun until more than a year and a half after the "petition" to the federal administrator, and until after final determination of the *64th Street* action and condemnation and resale of the area (20a, 60a).

ARGUMENT

I

The First Amendment issue as to the effect of Fordham's participation on the expenditure of federal funds is *res judicata*, without merit on the facts, and not an issue which petitioners have standing to raise.

For at least three reasons petitioners' constitutional contentions do not warrant review by this Court:

1. *The issue is res judicata.*

The Court below looked to state law to determine the effect of the prior state court judgment in the *64th Street* action, as was required in order to give that judgment "the same full faith and credit in every court within the United States" as it has "by law or usage in the courts of such State * * *" (28 U. S. C. § 1738, 62 Stat. 947). *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932). Applying New York law, the Court correctly found the prior judgment to be *res judicata* against petitioners not only as to all defendants in the prior action (the city officials and redevelopers), but on this issue as to the federal officials as well. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956); *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14 (1937); *cf. Kessler* v. *Eldred*, 206 U. S. 285 (1907); *Civoru* v. *National Broadcasting Co.*, 261 F. 2d 716 (2d Cir., 1958).

While petitioners do not here question the binding effect of the prior judgment as to the city officials and redevelopers, they claim to be entitled to a fresh

determination on this point as to the federal officials, who were not made parties to the state court action.

But since, on the facts of record, the city's actions did not violate the "Establishment of Religion" clause, those of the federal government could not possibly do so. All acts in regard to Fordham were done by city officials; the federal officials merely assisted the project by payments to the city. Since the wall between church and state was not breached by the city's direct dealings with Fordham, it could not have been breached by the still more remote activities of the federal government.

The question whether there was any prohibited governmental subsidy to religion is the same as to the city and the federal government. The First Amendment in this respect is equally applicable to the federal government and to the states. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); see *Everson* v. *Board of Education*, 330 U. S. 1, 8 (1947). Even if in the *64th Street* action unconstitutional use of federal funds had not been repeatedly urged—as it was (see for example the prior petition to this Court in *Harris* v. *City of New York*, pp. 4, 16)—failure there to raise that specific question[1] would not affect the basic issue.

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[1] Petitioners urge also that the state court would and could not pass upon the acts of the federal administrator and the use of federal funds (petition, pp. 8, 10). If so, the reasons (apart from plaintiffs' election not to join federal officials) are fundamentally lack of standing and other similar considerations likewise applicable to the Court below. This is indicated by the decisions relied on in *Hunter* v. *City of New York*, 121 N. Y. S. 2d 841, which is petitioners' only authority on this point.

2. *The 64th Street judgment was correct on the merits and this Court denied review.*

The undisputed facts of record before the lower Court were the same as those from which the New York courts concluded that there was no gift, grant or subsidy of public funds to Fordham, but an exchange of considerations pursuant to auction sale open to any other bidders able to meet the upset price established by appraisal and to clear and redevelop in accordance with the applicable restrictions. On the facts there plainly can be no substantial question as to an "establishment of religion." As the New York Court of Appeals summed up petitioners' position:

> "The argument, however, proceeds on an assumption false in fact. * * * there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property." (4 N. Y. 2d at 275, 276.)

Certiorari to review that decision was denied. *Harris* v. *City of New York*, 357 U. S. 907 (1958).

See also *Berman* v. *Parker*, 348 U. S. 26 (1954).

3. *Petitioners lack standing to raise the issue.*

The provisions of the Housing Act here involved authorize the expenditure of federal funds; the functions of the federal administrator and agency are to execute the directions for such expenditures, with a large measure of discretion.

Accordingly, the acts of the administrator and agency are within that executive area in which courts have traditionally refrained from interference. *Massachusetts* v. *Mellon, Frothingham* v. *Mellon*, 262 U. S. 447 (1923); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

And even though petitioners may suffer adverse consequences, the propriety of expenditure of federal funds is a matter which they have no standing to raise. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Allied-City Wide* v. *Cole,* 230 F. 2d 827 (App. D. C. 1956); *cf. Frothingham* v. *Mellon,* 262 U. S. 447, 486-489 (1923); *City of Atlanta* v. *Ickes,* 308 U. S. 517 (1939).

Petitioners' occupancy has been affected not by the administrator's expenditure but by the city's condemnation. Under New York General Municipal Law, § 72-k, the right of condemnation is entirely independent of federal aid. And here the city's condemnation has been held constitutionally unassailable.

II

Petitioners had neither a Fifth Amendment nor a statutory right to a hearing before the federal administrator.

Petitioners' contention that the Federal Housing and Home Finance Administrator wrongfully refused a hearing is completely refuted by the opinion below (Appendix "B" to petition, pp. 34-36).

No such hearing is required by the Housing Act. As petitioners concede (petition, p. 12), the Act expressly provides for a public hearing before the local agency, but not the federal administrator. And the complaint expressly alleges that public hearings were had both before the City Planning Commission and the Board of Estimate (18a). Since it is the local

bodies which under the Act are responsible[1] for determining the areas to be cleared and redeveloped and for devising the plan and method of relocation,[2] it is peculiarly appropriate that the hearing should be before them rather than the federal administrator. Nothing in the Housing Act, therefore, even implies a right to any hearing before the administrator.

Since there is no right to a hearing under the Housing Act, Section 5 of the Administrative Procedure Act[3] would not better petitioners' position in this respect unless the Constitution required a hearing as a matter of procedural due process. The Administrative Procedure Act exempts from its requirement hearings of "less than statutory authority". See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 (1950).

Clearly there was no such constitutional right here. The effect of the administrator's acts upon local resi-

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[1] See 42 U. S. C. § 1455; also 42 U. S. C. §§ 1451 and 1452(d). Clear expressions of the intention of Congress to put the primary responsibility on the local agencies are found in the legislative history. S. Rep. No. 84, 81st Cong., 2d Sess., 1949 U. S. Code Cong. Serv., p. 1551. See also pp. 1562, 1564, 1566; and 95 Cong. Rec. 4583, 9140.

[2] There is no basis in the record for the implication (petition, p. 12) that relocation requirements have been "totally disregarded" by federal and local public agencies. The complaint did not even assert that there was no adequate relocation plan but only that petitioners were entitled to a hearing by the administrator before approval (22a-23a). The source of some of the views referred to in the law review article cited in the petition seems to be petitioners' attorney. See 72 Harv. L. Rev. 504, 515 at note 102.

[3] Section 5 provides for administrative hearing in the case of "adjudication required by statute to be determined on the record after opportunity for an agency hearing". 60 Stat. 239, 5 U. S. C. § 1004.

dents was remote,[1] for federal aid was not a prerequisite to the city's power to condemn under state law,[2] and only because federal aid was sought was there any obligation for the city to comply with the Housing Act, or any call for a relocation plan. Moreover, even if the federal capital grant contract with the city had had a more direct impact on individuals within the area, there is no constitutional right to a hearing before a federal official may expend funds upon his determination that statutory requirements have been met,[3] and where, moreover, the determination is one which might have been made summarily by the Congress.[4]

Petitioners' claim of right to a hearing—by virtue either of the Constitution or Section 5 of the Administrative Procedure Act—stems essentially from the contention that the administrator made an "adjudication" (petition, pp. 13-15). That this was not the character of his acts results from the nature of his function under the Housing Act, which is to make federal funds avail-

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[1] In this respect, among others, there is a fundamental difference between the situation here and that in *Parker* v. *Fleming*, 329 U. S. 531 (1947). There, the certificate of the administrator, directed to the individual case, permitted an eviction which would otherwise have been illegal.

[2] New York General Municipal Law, § 72-k.

[3] See separate concurrence of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 167 (1951), citing *United States* v. *Babcock*, 250 U. S. 328; *cf. United States ex rel. Dunlap* v. *Black*, 128 U. S. 40.

[4] *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441 (1915); see also the above-mentioned concurrence. Any effect on petitioners' occupancy results of course from the city's choice of the particular locality for redevelopment. And this Court has settled that the necessity of taking the particular property for a public purpose is a legislative determination, as to which there is no right to a hearing. *Rindge Co.* v. *Los Angeles*, 262 U. S. 700 (1923); *Bragg* v. *Weaver*, 251 U. S. 57 (1919).

able to local bodies in accordance with Congressional directives. Cases of "adjudication" cited by petitioners (pp. 13-14) deal with situations which are not analogous.

In the absence of adjudication, there is likewise no force to petitioners' arguments that (apparently regardless of the nature of the determination) a hearing is essential to proper exercise of discretion; and that to rely on any information other than that adduced at a hearing is arbitrary, capricious, and a denial of due process. The cases cited (petition, pp. 14-15) are not susceptible of such distortion as to support petitioners' contentions. Statements and decisions as to "adjudications which have serious impact on private rights"[1] (though made by administrative agencies), or involving the proper evidentiary basis for an adjudication, cannot be torn out of context and applied to the entirely different, non-adjudicative type of decision here involved: *i.e.*, evaluating a slum clearance plan to determine whether federal funds should be granted.

Nor can it be inferred that the administrator's determination lacked reasonable factual basis merely because he held no hearing.

As required by the Housing Act, public hearings were had before two city agencies responsible for formulating the project plan and relocation procedures. It would be novel doctrine to imply any constitutional requirement for three hearings.

Finally, a year and a half passed between rejection of the petition to the administrator and commencement of this action, and meantime fundamental changes of

[1] *Cf. Wong Yang Sung v. McGrath*, 339 U. S. 33, 37 (1950).

position occurred. No explanation is or can be offered for the delay. This action is barred by *laches*. *Hays v. Port of Seattle*, 251 U. S. 233, 238-9 (1920).

Conclusion

The questions raised are not substantial and lack merit. The petition should be denied.

Respectfully submitted,

WILLIAM ELDRED JACKSON
15 Broad Street
New York 5, New York
Attorney for Lincoln Center for the Performing Arts, Inc., Respondent.

REBECCA M. CUTLER
15 Broad Street
New York 5, N. Y.
Of Counsel.

April 8, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY d/b/a Iconic Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO. INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

against

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency, WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT FORDHAM UNIVERSITY IN OPPOSITION

/s/ EDWARD D. BURNS,
Counsel for Respondent Fordham University,
30 Exchange Place,
New York 5, New York

/s/ ROGERS R. CHANDLER,
/s/ MARTIN FEILMAN,
Of Counsel.

April 8, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY d/b/a Loric Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO. INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

against

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT FORDHAM UNIVERSITY IN OPPOSITION

Opinions Below

The opinion of the District Court is reported at 166 F. Supp. 129. The opinion of the Court of Appeals for the Second Circuit is reported at 263 F. 2d 244.

Constitution and Statutes Involved

The pertinent provisions of the Constitution (First Amendment), the Housing Act of 1949, as amended (63 Stat. 413, 414, 416, 420; 42 USC secs. 1441, 1451, 1452, 1455, 1460; 68 Stat. 622, 42 USC sec. 1450), are set forth in the petition as Appendix A.

Statement

Petitioners,* tenants and former owners of real property in the area covered by the Lincoln Square Title I Urban Renewal Project of New York City, seek to challenge the Project upon the alleged grounds that (1) the action of the Federal Housing and Home Finance Agency (hereafter "FHHFA") in approving the Project violated the First Amendment because of the participation of Fordham University, a denominational educational institution, and (2) the action of the Housing Administrator in declining to grant an oral hearing in 1957 to two** of the petitioners was in derogation of the Housing Act of 1949 (Pet. p. 2).

The Lincoln Square Project which petitioners seek to defeat is a slum clearance and urban renewal project covering a thirteen block slum area on the West Side of Manhattan in New York City. In determinations not here challenged, the duly constituted agencies of the City

* 145-147 W. 61st Corporation vacated its premises during the pendency of this action.

** Of the petitioners here, only two were parties to the petition to the Housing Administrator—Schuckman Press, Inc. and Howdibon Garage Co. Inc. As appears from the brief on behalf of the New York City officials, Schuckman Press has accepted from the City a check in full payment of its claim in the condemnation proceeding.

found the Lincoln Square area to be sub-standard and insanitary and, pursuant to Article XVIII of the New York Constitution and Section 72-k of the New York General Municipal Law, proceeded to devise a plan for elimination of the slum and rehabilitation of the area (App. below, pp. 34a-37a).

The procedure followed was precisely the same as that in every other slum clearance project in the City of New York and had been repeatedly sustained by the courts (*Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. den. 347 U. S. 934; *Matter of Murray* v. *LaGuardia*, 291 N. Y. 320, cert. den. 321 U. S. 771; *Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. 2d 293, aff'd 286 App. Div. 828, mot. for lv. to ap. den. 309 N. Y. 1029; *Boro Hall Corp.* v. *Impellitteri*, 128 N. Y. S. 2d 804, aff'd 283 App. Div. 889, mot. for lv. to ap. den. 307 N. Y. 672).

In fact, the very plan here challenged has been sustained in another action brought by the same counsel on behalf of other members of the same classes as petitioners (*64th St. Residences, Inc.* v. *City*, 4 N Y 2d 268, cert. den. *sub nom. Harris* v. *City*, 357 U. S. 907; 1957 Term, No. 1014).

The Project Plan called for inclusion of four basic site areas: a housing development, a performing arts center, an institutional area for which the sponsor is the American Red Cross, and a collegiate site to be redeveloped by an educational institution for such use (cf. *Berman* v. *Parker*, 348 U. S. 26, 34-35).

After public hearings before both the City Planning Commission and the Board of Estimate (pursuant to 42 USC, sec. 1455) the Project Plan was approved and submitted with the record of the hearings to the FHHFA which likewise approved.

Subsequently, the City acquired title to the Project area through condemnation, and at a public auction pursuant

to Section 72-k of the General Municipal Law, the sponsors successfully bid for their respective sites and title was conveyed to them (App. below, pp. 81a-82a).

The parcel acquired by Fordham University constitutes approximately 15% of the total Project area. Fordham proposes to locate thereon its downtown schools of law, education, business and social service.

Fordham is a New York educational corporation, administered by members of the Jesuit order, but whose faculty is not composed exclusively of either members of that order or persons of the Catholic faith. Throughout the 115 year history of Fordham, individuals of all races, colors and creeds have been, and will continue to be, included in its student body.

Prior Litigations

As noted by Chief Judge Clark "This is the fifth of a prolonged series of actions attacking the validity of the Lincoln Square Urban Renewal Project, a slum redevelopment project of the City of New York partially financed by federal funds under Title I of the Housing Act of 1949, 42 U.S.C. §§1441 *et seq.*" The chronology of these actions follows:

(1) In 1956, an action was commenced in the Supreme Court of New York to enjoin future acts processing the Project upon the ground, *inter alia*, that Fordham's participation in the Project was in violation of the Constitution. The plaintiffs were William Loebner (the same Loebner who is petitioner herein), suing as a taxpayer, and two others suing as tenants on behalf of themselves and all others similarly situated. The complaint was dismissed for prematurity, the court also noting his belief that the action had no merit (*Loebner v. City of New York*, 162 N. Y. S. 2d 233).

(2) In October, 1957, another plaintiff instituted an action in the New York Supreme Court attacking the Project upon substantially the same grounds asserted in the *Loebner* action. This action was also dismissed for prematurity (*89 Amsterdam Avenue Corp.* v. *City*, NYLJ, Nov. 13, 1957, p. 7).

(3) In December, 1957, a third complaint was filed in the Supreme Court which pleaded two causes of action—one by plaintiffs who alleged to be owners and taxpayers, the other by persons alleging to be tenants in the Project area. The tenant-plaintiffs expressly brought their action "on behalf of themselves and all others similarly situated", and it was clear that both alleged causes of action were in fact representative in character. The alleged basis for the relief sought was that the condemnation of the slum area and the sale to Fordham were void because they resulted in an unconstitutional grant of public monies to a denominational institution. The complaint was dismissed on the merits (*64th St. Residences, Inc.* v. *City*, 10 Misc. 2d 841; aff'd 5 A D 2d 824; aff'd 4 NY 2d 268, cert. den. *sub nom. Harris* v. *City*, 357 U. S. 907).

(4) On February 19, 1958, while the third action was pending, another group of tenants, again expressly suing on behalf of themselves and all others similarly situated, commenced a new action in the District Court for the Southern District of New York. The complaint in this action was substantially identical with the complaint in the *64th St. Residences* action, and was dismissed by Judge Dimock (*Cohen* v. *City of New York*). An appeal taken from this decision has not been prosecuted.

(5) On June 16, 1958, seven days after this Court denied the petition for a writ of certiorari in the *64th St. Residences* action (*sub nom. Harris* v. *City*) the present action

was commenced. Again the plaintiffs alleged the same grievance and sought substantially the same relief (except as to the new claim that they were entitled to an oral hearing before the Administrator) as in the *64th St. Residences* action.

It is not without significance that in each and every one of the foregoing five actions, the plaintiffs were represented by the same counsel.*

Argument

Although the petition states that it "is not directed to that portion of the judgment of the court below which affirmed the District Court's dismissal of the complaint as to these respondents [City of New York, Fordham, etc.] on the grounds that a judgment in a prior state court action [*64th St. Residences*] in which they were parties, was res judicata" (Pet. p. 3), petitioners nevertheless seek to relitigate the questions decided in that action by now urging that the action of the FHHFA in approving the Project was in violation of the First Amendment for the identical reason there urged, *viz.*, because of Fordham's participation (Pet. p. 2).

It is clear, however, that petitioners, as members of the classes represented by plaintiffs in the *64th St. Residences* action, are barred from relitigating issues raised in that action. The City's use of federal funds was discussed by the New York Court of Appeals in its opinion in that action, and was emphasized in the petition for certiorari to this Court (cf. Pet. in *Harris v. City*, pp. 3, 4, 11 *et seq.*). Since the New York courts would not suffer this

* Harris L. Present, Esq. has always been counsel of record, assisted by the firm of Dickstein, Shapiro & Friedman, except that Mr. Shapiro of that firm signed the petition for certiorari in the last case. Mr. Present's name appeared, however, as counsel, upon that petition (1957 term, No. 1014).

issue again to be litigated, the issue is likewise barred in the federal courts. The determination of the constitutionality of the expenditure of federal funds for the Project cannot depend upon whether the defendants in the action are city officials, as in the *64th St. Residences* action, or federal officials, who have been added as defendants in this action.

Although they concede "that the Housing Act specifies only a hearing before a local public agency" (Pet. p. 12), petitioners also claim that the Act requires that they be afforded a hearing before the FHHFA on their alleged objections to the relocation features of the Project Plan (Pet. p. 2). The Housing Act expressly provides for a public hearing, two of which were held in this case, before the local agencies (42 USC sec. 1455). Petitioners' counsel appeared and was heard at length at both. But nowhere is an oral, or any other type of hearing, required or authorized before the Federal Administrator. It was the congressional intent, expressed in the Housing Act, that the local authorities in the area where the slum clearance project is to be undertaken, rather than federal officials, are to be responsible for determining the area which is to be the subject of the redevelopment plan, and for devising a workable plan and method of relocation (U. S. Code Congressional Service, 83rd Cong., 2nd session, 1954, pp. 2758-2759; 2762-2763).

Next petitioners try to read into the language of section 5 of the Administrative Procedure Act (5 USC sec. 1004) a requirement of a hearing. Section 5 requires a hearing only when there is an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." The section has been held to apply only to hearings required by statute or greater authority (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50).

No hearing before the Administrator was required here by either Constitution or statute; and it is also clear that the Administrator here made no "adjudication" such as is contemplated by the Administrative Procedure Act.

In any event, we submit that in accepting and considering the written petition and supporting brief filed on behalf of those who sought an oral hearing before him, the Administrator demonstrated his willingness to consider petitioners' papers in reaching the conclusion, which rests in his discretion, required of him by the Housing Act.

I

The Decision Below is Clearly Correct

a) Fordham's participation in the urban renewal project does not violate the First Amendment.

(i) *Petitioners are barred from relitigating this issue.*

The complaint in the *64th Street Residences* (*Harris* v. *City*) action makes clear that the action was, even apart from the fact that counsel so designated it, a traditional class action (*Ashton* v. *Rochester*, 133 N. Y. 187; *People's Gas & Electric Co.* v. *Oswego*, 207 App. Div. 134, aff'd 238 N. Y. 606). The present action, both in designation and in fact, is similarly a class action.

As Judge Clark said: "There is no dispute here that the claims asserted in this action against defendants other than Cole and Fried are identical with those unsuccessfully raised against these same parties in the prior New York action" (Pet. App. B. p. 29).

The sole difference is that defendants in the prior action included local governmental officials whom plaintiffs sought to enjoin, while the present action also names as defendants officials of the FHHFA.

It is clear that plaintiffs in the prior action, and petitioners herein, have common interests and an identical grievance; it is also clear that the same counsel appears for both groups.

The courts below were, therefore, correct in holding that (1) the New York Courts in the prior action had jurisdiction of the subject matter; (2) petitioners, as members of the classes of plaintiffs in the prior action, were barred by the judgment therein from relitigating the same issues in the state court; (3) the Full Faith and Credit clause of the Constitution and the legislation thereunder require the federal courts to give the same effect to the state court judgments (*American Surety Co.* v. *Baldwin*, 287 U. S. 156; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430).

If the First Amendment (through the Fourteenth Amendment) was not violated (and the courts so held in the prior action) by the action of the local officials, the First Amendment—which applies equally to the state and federal governments (*Zorach* v. *Clauson*, 343 U. S. 306; *Everson* v. *Board of Education*, 330 U. S. 1; *Cantwell* v. *Connecticut*, 310 U. S. 296)—cannot be violated by the same alleged facts, merely because federal officers are named as defendants. Since the New York courts would not permit petitioners to relitigate this issue, petitioners are barred likewise in the federal courts (*Israel* v. *Wood Dolson Co.*, 1 N Y 2d 116; and see *Kessler* v. *Eldred*, 206 U. S. 285).*

* It is of interest that the same procedure was attempted by the objectants to the Washington Square Project. That case was litigated in the state courts (*Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. 2d 293, aff'd 286 A. D. 828, mot. lv. ap. den. 309 N. Y. 1029), and then an action was commenced in the federal court seeking to enjoin the Housing Administrator. The United States Court of Appeals for the District of Columbia affirmed the dismissal of that complaint (*Allied City Wide, Inc.* v. *Cole*, 230 F. 2d 827).

(ii) *There is no substance to petitioners' argument, even if the merits are reached.*

In the petitions for certiorari in both the present and prior actions, petitioners allege identical reasons to support their assertion that the Housing Act, as applied to the Lincoln Square Project, is unconstitutional because of the participation of Fordham University.

These petitioners assert, as did those before them speaking through the same counsel, that there is a subsidy to Fordham, and that the determination to have an educational area in the urban renewal project was made solely for the benefit of Fordham. The first claim is false in law and fact, and the second is untrue. Judge Desmond's opinion in the prior action (which we have annexed hereto as Appendix A) is lucid upon this (4 N Y 2d 268, 275-6):

> "Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the

$7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

"Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding."

Further, as to the propriety of establishing an educational area in a project such as this, this Court has noted that "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets and shopping centers" (*Berman* v. *Parker*, 348 U. S. 26, 34-35).

Beyond this, it is clear that petitioners here seek to challenge the action of the Administrator in authorizing the expenditure of federal funds pursuant to an Act of Congress. The courts have consistently held that petitioners such as these lack standing to question the propriety of the expenditure of federal funds, and the courts will not interfere with the acts of an administrator concerning such expenditures (*Massachusetts* v. *Mellon*, 262 U. S. 447; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Allied-City Wide Inc.* v. *Cole*, 230 F. 2d 827).

There is no need here to restate further and at length the lack of merit to petitioners' claims with respect to the First Amendment (see the papers in *Harris* v. *City*, 357 U. S. 907; 1957 Term, No. 1014).

b) Petitioners have no statutory or other right to an oral hearing before the FHHFA.

Petitioners in their "questions presented" (Pet. p. 2) ask this Court to pass upon the question "Whether under the provisions of Title I of the Housing Act of 1949, 63 Stat. 413, as amended, 42 U.S.C. Sections 1441 *et seq.*, tenant petitioners had a right to be heard and present testimony before the Federal Housing and Home Finance Agency in support of their objections to the relocation plan of the Lincoln Square Urban Renewal Project?"

The first point of inquiry is the Housing Act itself. That the Act neither requires, nor contemplates, a hearing —much less an oral hearing—before the federal agency is admitted in the petition, where at p. 12 it is stated that "• • • it is true that the Housing Act specifies only a hearing before a local public agency"*.

* The footnote reference (Pet. p. 12) to 72 Harvard Law Review. 504, 515 contributes nothing to the issue here, but is illuminating because of its source. The students who wrote the note cite as an authority a statement made to them by petitioners' counsel! (*idem* p. 515).

It provides that "No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing" (42 USC, sec. 1455(d)).

Two hearings were held, one before the New York City Planning Commission, the other before the Board of Estimate, and counsel for petitioners appeared at both and presented his contentions at length orally (App. below, p. 18a).

It is also clear that there was deliberate and sound reason behind the determination of Congress to require a hearing at the local level, without duplication thereof before the FHHFA. The purpose of Congress was to encourage and assist local governments to clear slums and blighted areas. Thus, for example, 42 USC, sec. 1452(d)] authorizes the Administrator to "make advances of funds to *local public agencies* for surveys of urban areas to determine whether the undertaking of urban renewal projects therein may be feasible • • •." (emphasis supplied). Basically the purpose and intent of the Act is that the local authorities initiate and undertake slum clearance projects.

"The bill provides that *local community must present* to the Housing Administrator a workable program for eliminating and preventing slums and urban blight, and the Administrator must have approved *the local program* before Federal aid will hereafter be made available to the community • • •. The workable program requirement seeks a bona fide and practical expression of the community's own projected program to deal with its own problems • • •" (U. S. Code Congressional Service, 83rd Cong., 2nd Session, 1954, pp. 2758-2759, S. Rep. No. 1472, emphasis supplied; and see, U. S. Code Congressional Service, 81st Cong., 1st Session, 1949, p. 1551, S. Rep. No. 84).

The Administrator makes loans or grants funds to local bodies within his discretion (42 USC, secs. 1451, 1452) and within limits set by Congress, but he neither initiates a project, determines the location of such project, nor does any of the basic planning therefor. This is all done at the local level, pursuant to the legislative purpose.

It is thus proper and consistent with orderly procedure that the hearing on the proposed plan be at the local level where the plans for the project are formulated and carried out. The Administrator determines whether the local plan submitted to him presents "a workable program" (42 USC, sec. 1451), either approving or disapproving the plan developed by the local agencies. There is no occasion for an additional repetitive hearing before the Administrator.

Nevertheless, those who petitioned the Administrator in the Lincoln Square Project were permitted to present their views. This they did by submitting a petition and a lengthy brief (43 pages) and appendix, containing facts and figures allegedly supporting their claims, signed by counsel for the present petitioners. It is of record (App. below, p. 68a) that counsel was told that the "information furnished by you will be considered with other documentation when the application" is considered.

An oral hearing before the Administrator was not required.

The cases cited where federal administrators were required to make quasi-judicial "adjudications" which affect private rights (Pet. p. 15) do not support petitioners' assertions. Here the Administrator's action was only to determine whether the Congressional standard for the expenditure of federal funds had been met by the local

agencies. There was no "adjudication," much less one as is contemplated by the cases cited.

Section 5 of the Administrative Procedure Act (5 USC, sec. 1004) not only does not support petitioners' claims, but demonstrates that the challenged decision made by the Administrator here is not the type as to which a hearing is required. That Section refers to an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." This Court has held the quoted language as pertaining to hearings required by statutory or greater authority (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50).

Here, the Housing Act requires no hearing before the Administrator. Further, no "adjudication" directly affecting private rights and interests, such as is contemplated by the Administrative Procedure Act; was made, or could be made, by the Administrator. He had nothing to do with the planning of the Project or the determination of its boundaries or of the properties to be affected, all of which were committed by Congress to the local authorities, which gave full hearings. Nor does the act of the Administrator divest any person of property.* All the Administrator was empowered to determine was whether the plan as a whole, and as approved by local authorities after hearings, should, or should not receive a federal grant.

In each of the cases cited by petitioners (Pet. pp. 13-14) there was a quasi-judicial adjudication directly concerning the private right, statutory or constitutional, of an individual, such as his right to use the mails; the deportation of an alien; or the right of a common carrier to a certificate of public convenience. Here the Administrator only

* It is the act of condemnation by the local authorities, and not any act of Federal officers or agencies, that divests the title or interest of private persons to property in the slum area; and this, of course, can only be constitutionally done upon payment of just compensation.

determined that the local plan met Congressional requirements. There is neither statutory nor constitutional requirement, express or implied, that an oral hearing must be afforded in such case (see concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 167).

Further, the fact that the Administrator reached his conclusion without having an oral presentation by counsel for petitioners, does not mean that the Administrator's decision was made without sufficient basis in fact to support it.

Petitioners' contention (Pet. p. 14) that the Administrator's "sole reliance" on the plan and papers submitted to him by the City made his determination arbitrary, is capable of being proved conclusively incorrect both in fact and in law. First, it is of record (App. 68a) that the voluminous documents submitted by counsel for petitioners to the Administrator "will be considered with other documentation". Secondly, as we have seen, the function delegated to the Administrator by Congress is to decide if the *City's* plan is workable. To do this, the Administrator must basically consider the documentation submitted to him by the City in question. Congress left to the cities, as we have seen, the primary responsibility for slum clearance.

The two present petitioners-tenants who requested an oral hearing waited a year and a half after their request was rejected—during which the slum clearance project progressed, and substantial monies and effort were expended—before commencing this action. During this delay, the slum area was condemned, the property was sold to the redevelopers, and redevelopment began. This unjustified delay clearly precludes petitioners from now attempting to halt the progress of the slum clearance plan (*Hays* v.

Port of Seattle, 251 U. S. 233, 238-9). Especially should this be true where, as here, these petitioners are represented by the same counsel who challenged this project throughout, and it was only after all other means of attack failed that the present theory was advanced in a new lawsuit.

II

There is no important question of Federal law.

As to the first point argued by petitioners, *viz.*, that the presence of Fordham in the slum area to be redeveloped violates the First Amendment, petitioners are bound by the judgment in the prior class action (*64th St. Residences, Inc.* v. *City of New York*, 4 N Y 2d 268, cert. den. *sub nom. Harris* v. *City*, 357 U. S. 907, 1957 Term, No. 1014). And even if the merits of petitioners' claims can be reached, the same reasons which prompted this Court to deny certiorari when this same claim was first presented (*Harris* v. *City*, *supra*) should again indicate the same conclusion.

As to the denial of the alleged right of some of the petitioners to an oral hearing in support of the petition and written brief submitted in their behalf to the Administrator, we have demonstrated that there is neither statutory nor constitutional requirement—nor sound reason—for such a hearing.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

April 8, 1959.

Respectfully submitted,

EDWARD D. BURNS,
Counsel for Respondent
Fordham University.

PORTER R. CHANDLER,
MARTIN FOGELMAN,
Of Counsel.

APPENDIX A

Opinion per Desmond, J.

64TH ST. RESIDENCES v. CITY OF NEW YORK, 4 N Y 2d 268.

DESMOND, J. Plaintiffs are owners and tenants of real property in the so-called "Lincoln Square Project" area on the west side of Manhattan running from 60th Street to 70th Street, bounded on the east and west by various streets and consisting altogether of 13 city blocks. Beginning in 1954, by appropriate actions of various of its public officers and bodies, the city, as authorized by section 1 of article XVIII of the State Constitution and section 72-k of the General Municipal Law (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. denied 347 U. S. 934), found the Lincoln Square area to be "substandard and insanitary", approved a plan for renewal thereof and ordered its acquisition by the city through condemnation. To secure a grant of Federal moneys pursuant to the National Housing Act (U. S. Code tit. 12, § 1701 *et seq.*), the city's Board of Estimate presented to the Federal Urban Renewal Administration the city's proposal for the "Lincoln Square Urban Renewal Project". Before such presentation the city had obtained and had included in the plan agreements by various "sponsors". Among those sponsors are intervenors Fordham University and Lincoln Center for the Performing Arts, Inc., a newly formed membership corporation with the principal function of promoting the musical and dramatic arts.

Each such sponsor agreed, as part of the Urban Renewal Plan, to bid, at the auction provided for by section 72-k of the General Municipal Law, a stated minimum price and, if it should be the successful bidder, to relocate the prior occupants, clear its part of the site and redevelop

that part as required by the plan, with buildings to be approved by the city. Fordham University agreed as such sponsor to bid, for the two-block part set aside for "educational purposes", at least $2,241,610, or $7 per square foot, which was higher than the "re-use value" fixed by any of several appraisals. The city on its part agreed to acquire that allotted part (as well as the rest of the area) by condemnation, and, if Fordham University should be successful at the auction, to convey that part to the university at the auction price. Other sponsors made separate agreements which need not be described in detail. The Federal Housing and Home Finance Agency then approved the whole project and plan. The consequence of such approval is, under the Federal statutes (U. S. Code, tit. 42, § 1450 *et seq.*), that the Federal Government will pay two thirds of the difference between what the city pays for this land and the amount realized at the auction. The city itself must stand the other third.

After the plan had been approved, as above described, plaintiffs brought this present suit to invalidate the plan and to enjoin the city from carrying it out. The theory of the complaint is that the resale of part of this area to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of $3,500,000 in violation of section 7 of article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions. After the institution of this suit the city, on February 28, 1958, took title to the project area by condemnation and conducted the

auction at which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action, at least as praying for a declaratory judgment.

Special Term denied the motion of plaintiffs for a temporary injunction and for summary judgment and granted the motion of the defendants and intervenors under rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint on the ground that it does not state a cause of action. Appellate Division, First Department, unanimously affirmed without opinion, judgment of dismissal was entered thereon, and plaintiffs appeal to this court as of right, presumably on constitutional grounds (Civ. Prac. Act, § 588, subd. 1, par. [a]).

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the ten-

ants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.

Appendix A

At some points in their argument plaintiffs seem to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected (see *Kaskel v. Impellitteri*, 306 N. Y. 73, 95, *supra*—dissenting opinion, but representing the whole court's views on that question; and see *Bleecker Luncheonette v. Wagner*, 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029).

The judgment should be affirmed, with costs.

Chief Judge Conway and Judges Dye, Fuld, Froessel, Van Voorhis and Burke concur.

Judgment affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY, d/b/a Loric Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO., INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

v.

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WEBB & KNAPP LINCOLN SQUARE CORPORATION IN OPPOSITION

SAMUEL I. ROSENMAN
575 Madison Avenue,
New York 22, New York
Attorney for Respondent Webb & Knapp Lincoln Square Corporation

Of Counsel:
MAX FREUND
JEROME L. SINDLER
LAWRENCE B. BUTTENWIESER
575 Madison Avenue
New York 22, New York.

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT WEBB & KNAPP LINCOLN SQUARE CORPORATION IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 263 F. 2d 244.

The opinion of the United States District Court for the Southern District of New York is reported at 166 F. Supp. 129.

Jurisdiction

Petitioners predicate the jurisdiction of this Court upon 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which petitioners allege to be involved herein are set forth in Appendix "A" to the petition herein.

Questions Presented

We believe that petitioners do not raise any substantial federal questions herein and that all of the questions herein which petitioners allege to be substantial have already been foreclosed by decisions of this Court.

We further believe that the decision of the Court of Appeals herein does not conflict with any decision of this Court.

Statement

Petitioners, who are business and residential tenants in the Lincoln Square area of the Borough of Manhattan in the City of New York, brought this action to enjoin the prosecution of the Lincoln Square Title I Urban Renewal

Project (hereinafter referred to as the "Lincoln Square Project" or as the "Project") and to have certain actions of the Federal Housing and Home Finance Agency (hereinafter referred to as the "HHFA") and The City of New York (hereinafter referred to as "the City") relating to the Project declared illegal.

The Lincoln Square Project envisages the reclamation and the redevelopment of a thirteen-block portion of the Lincoln Square area (hereinafter referred to as the "Project Area"). The Project is divided into five component parts—the Collegiate Site, the Cultural Site, the Institutional Site, the Residential Site and the Co-Operative Site. Respondent Webb & Knapp Lincoln Square Corporation (hereinafter referred to as "Webb & Knapp") is the redeveloper only of the Project's Residential Site. As such redeveloper, Webb & Knapp is now relocating tenants from the Residential Site and demolishing the existing buildings thereon and will erect thereon modern, fireproof multiple dwellings and related retail facilities.

Petitioners commenced this action on June 16, 1958 by filing a complaint with the Clerk of the United States District Court for the Southern District of New York. Petitioners served the summons and complaint herein upon all respondents between June 17, 1958 and June 20, 1958.

Thereafter, respondents moved to dismiss the complaint and for summary judgment and petitioners moved for a preliminary injunction.

On August 5, 1958, the District Court (Dimock, J.) granted respondents' motions to dismiss the complaint and for summary judgment and denied petitioners' motion for a preliminary injunction.

On August 28, 1958, petitioners filed a notice of appeal from the order and judgment of the District Court. On January 16, 1959, the Court of Appeals for the Second Circuit (Clark, C. J., and Hincks and Lumbard, J.J.s) affirmed the order and judgment of the District Court. On February

11, 1959, an order was made and filed making the judgment of the Court of Appeals the judgment of the District Court.

Petitioners then filed the present petition to this Court.

Argument

We understand petitioners' contentions in this Court to be as follows: (a) that the use of federal funds for the Lincoln Square Project raises a substantial federal question (petition, pp. 9-11); (b) that the denial by the HHFA of petitioners' request to be heard in support of their objections to the relocation plan for the Lincoln Square Project raises a substantial federal question (petition, pp. 11-16); and (c) that the decision of the Court of Appeals herein with respect to those two issues conflicts with applicable decisions of this Court (petition, pp. 9-11, 11-16).

The brief of respondents Cole and Fried herein will adequately demonstrate that the denial by the HHFA of petitioners' request to be heard does not raise a substantial federal question and that the decision of the Court of Appeals herein with respect to that issue does not conflict with applicable decisions of this Court.

Accordingly, in this brief, we endeavor to show that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question and that the decision of the Court of Appeals herein permitting such use of federal funds does not conflict with applicable decisions of this Court.

I

The use of federal funds for the Lincoln Square Project does not raise a substantial federal question.

Petitioners assert that the use of federal funds for the Lincoln Square Project raises a substantial federal ques-

tion not heretofore resolved by this Court (petition, pp. 9-11).

Petitioners base that assertion upon the ground that the use of federal funds for a slum clearance project involving a sectarian institution violates the "establishment of religion" clause of the First Amendment.

Specifically, petitioners allege (petition, p. 11):

> "Here, where the provisions of the plan and the sponsorship contract provided for the sale of an educational site to Fordham University for a sum about 3½ million dollars less than its cost of acquisition (two-thirds of which is payable by the federal government) and land use restrictions which lowered the land value were adopted with Fordham University—and only Fordham University—in mind and in contemplation, federal support and approval were prohibited by principles of separation of church and state based upon the 'establishment of religion' clause of the First Amendment."

In short, petitioners' challenge is based upon the resale of the Collegiate Site of the Lincoln Square Project to respondent Fordham University (hereinafter referred to as "Fordham"), a denominational educational institution, at a "writedown" from the cost of acquisition.

(a)

First, we submit that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question because of this Court's denial of the petition for a writ of certiorari in *64th Street Residences, Inc., et al. v. City of New York, et al.*, 4 N. Y. 2d 268, 150 N. E. 2d 396, *cert. denied sub nom. Harris, et al. v. City of New York, et al.*, 357 U. S. 907.

The *Harris* case came up through the New York courts and reached this Court on a petition for a writ of certiorari to the New York Court of Appeals.

In the *Harris* case—as in this case—tenants in the Lincoln Square area challenged the validity of the Lincoln Square Project on the ground that the sale of the Collegiate Site to Fordham at a writedown violates the "establishment of religion" clause (petition for certiorari, October Term, 1957, No. 1014, pp. 14-15).

The only difference between the *Harris* case and this case on the "establishment of religion" issue is that, in the *Harris* case, in challenging the validity of the Lincoln Square Project, the petitioners therein attacked both the use of City funds and the use of federal funds (petition for certiorari, October Term, 1957, No. 1014, pp. 14-15) whereas, in this case, petitioners' attack is limited to the use of federal funds (petition, p. 11).

In the *Harris* case, this Court refused to review a decision of the New York Court of Appeals which had held specifically that the sale of the Collegiate Site to Fordham at a writedown did not violate the "establishment of religion" clause. The New York Court of Appeals had stated (4 N. Y. 2d at 275-276, 150 N. E. 2d at 398-399):

> "Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to

raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

"Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding."

(b)

Second, we submit that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question because the circumstances surrounding the re-use of a slum clearance area are irrelevant in determining the validity of a slum clearance project.

Under Title I and similar statutes, land is condemned by a municipal agency to achieve the public purpose of slum clearance and then re-sold to a redeveloper (see pp. 12-13, *infra*, for a discussion of the course of a Title I project).

The courts of New York have held that a taking for slum clearance is in itself a taking for a public purpose, and that the nature of the re-use is irrelevant.

Thus, in *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 659, *cert. denied*, 347 U. S. 934, the New York Court of Appeals stated (306 N. Y. at 93, 115 N. E. 2d at 669-670).

> "Section 72-k of the General Municipal Law is drawn upon the basis, upheld in *Matter of Murray* v. *La Guardia*, that slum clearance is in itself a public purpose, which is separate and distinct from the objects to which the land may subsequently be devoted after being redeveloped by private capital. The State Constitution does not require that slums shall be rehabilitated exclusively by reconstruction for low cost housing, which is a different public purpose that may or may not be superimposed on slum clearance (*Matter of Murray* v. *La Guardia*, *supra*). Consequently, except where an applicable statute requires, the slum area may be cleared, replanned, reconstructed and rehabilitated according to any design and for any purpose which renders the area no longer substandard or insanitary."

Since this Court has never condemned as a violation of the Constitution a taking upheld by a state court as a tak-

ing for public uses in conformity with its laws, *U. S. ex rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546, 552, this Court should not look to the circumstances surrounding the re-use of an area to be cleared of slums.

In *Harris* v. *City of New York*, *supra*—as in this case—we opposed the petition for a writ of certiorari on the ground that the circumstances surrounding the re-use of the Lincoln Square Project were irrelevant in determining the validity of the Project (brief in opposition to petition for certiorari, October Term, 1957, No. 1014, pp. 6-8) and, as noted above, this Court denied that petition.

Our position finds further support in the decisions of this Court in *Burt* v. *Pittsburgh*, 340 U. S. 802, and *Berman* v. *Parker*, 348 U. S. 26.

In the *Burt* case, this Court affirmed, on the authority of the *Welch* case, *supra*, the judgment of a three-judge District Court which refused to look beyond the condemnation of a slum area to the character of the re-use.

In the *Berman* case, this Court, in affirming the dismissal by a three-judge District Court of an action seeking to enjoin a Washington, D. C. Title I project, refused to look to the circumstances of re-use as a ground for invalidating the project. This Court stated that the object—slum clearance—was within the power of Congress to attain and that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine" (348 U. S. at 33).

(c)

Third, assuming, *arguendo*, that the circumstances surrounding the re-use of a slum clearance area are relevant in determining the validity of a slum clearance project, we submit that the use of federal funds for the Lincoln Square Project does not raise a substantial federal question under the "establishment of religion" clause in view of *Berman* v. *Parker*, *supra*.

In the *Berman* case, this Court, in upholding the constitutionality of the District of Columbia Redevelopment Act of 1945,* clearly indicated that a religious institution may participate in a Title I project. The Court said of the Title I project there challenged (348 U. S. at 34-35):

> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, *churches*, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. • • • Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power." (emphasis supplied)

Petitioners themselves admit that this allegedly substantial federal question may have been settled by the *Berman* case. Petitioners state (petition, p. 11):

> "Petitioners do not believe that the question presented has ever been settled by this Court unless that portion of the opinion in *Berman* v. *Parker*, 348 U. S. 26, 34-35, which states that it was within the power of Congress to authorize the District of Columbia Land Redevelopment Agency to attack the problem of Slum Clearance on an area or regional basis and to redesign the area so that a balanced integrated plan could be developed for the region, including not only new houses but also schools, churches, parks, streets and shopping centers', may be taken to mean that churches (and other religious institutions) may participate as urban redevelopers, and pay less than market value, or even nothing, for the land which they redevelop."

---

* 60 Stat. 790; D. C. Code, 1951, Title 5, §§ 5-701—5-719.

II

The decision of the Court of Appeals herein permitting the use of federal funds for the Lincoln Square Project does not conflict with the applicable decisions of this Court.

Petitioners assert that the decision of the Court of Appeals herein permitting the use of federal funds for the Lincoln Square Project conflicts with the decisions of this Court in *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, 333 U. S. 203; and *Zorach* v. *Clauson*, 343 U. S. 306 (petition, pp. 9, 10).

In those three cases, this Court ruled that cities and states may not subsidize religious institutions, but none of those cases conflict with the case at bar.

In the *Everson* case, this Court, in upholding a New Jersey statute which authorized local school districts to make rules and contracts for the transportation of children to and from parochial schools, stated (330 U. S. at 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

In the *McCollum* case, this Court, in striking down a "released time" program of the Champaign, Illinois, public school system, reiterated the language of *Everson* quoted above.

In the *Zorach* case, this Court upheld a New York City "released time" program because it "involves neither religious instruction in public school classrooms nor the expenditure of public funds" (343 U. S. at 308-309).

Thus, the decision of the Court of Appeals herein could be held to conflict with the decisions of this Court in the *Everson, McCollum* and *Zorach* cases, *supra,* only if the use of federal funds for the Lincoln Square Project results in a subsidy to a religious institution.

Petitioners allege that the use of federal funds for the Lincoln Square Project results in a subsidy to a religious institution (a) because Fordham is one of the redevelopers of the Project and the Title I scheme necessarily results in the subsidization of the redeveloper (petition, p. 11) and (b) because of the particular facts underlying Fordham's participation in the Lincoln Square Project (petition, pp. 5-6, 10-11).

However, we contend (a) that a redeveloper does not receive a subsidy by participating in a Title I project and (b) that Fordham has not received a subsidy by participating in the Lincoln Square Project.

(a)

The course of a Title I project is in barest outline as follows: A municipal agency (e.g., a city) acquires a slum area. The agency then either sells (or leases), or clears and then sells (or leases), that area to a redeveloper, either at a negotiated price or after a public auction, subject to specific re-use restrictions. The difference between the cost of acquiring (or of acquiring and clearing) that area and the sales price paid by the redeveloper

for that area is shared by the agency and by the federal government. The redeveloper then redevelops that area in accordance with the redevelopment or renewal plan embodying the re-use restrictions.

If a subsidy lurks anywhere in the Title I scheme, it could only lurk in the differential between the cost of acquisition (or of acquisition and clearance) and the subsequent resale price. Petitioners contend that a subsidy does lurk there (petition, p. 11).

However, every court which has passed upon slum clearance projects has rejected the contention that the differential between the cost of acquisition (or of acquisition and clearance) and the resale price results in a subsidy.

That question was specifically raised by the petition for a writ of certiorari in *Harris* v. *City of New York, supra* (petition, October Term, 1957, No. 1014, pp. 14-15), and, as noted above, this Court denied that petition.

In *State* v. *Land Clearance, etc.*, 364 Mo. 974, 270 S. W. 2d 44, the court, in determining that the redeveloper of the project there involved had not been subsidized, stated (364 Mo. at 989-990, 270 S. W. 2d at 53):

> "It would be difficult to imagine a workable law that exacted more from a purchaser than a 'fair value' price. An exaction that the purchaser pay fair value cannot conceivably amount to a grant or subsidy. Both the statute and the undertakings of respondents pursuant thereto so clearly demonstrate that the purpose in acquiring the land is to rid it of its blighted and insanitary condition and to thereafter convey it to redevelopers for conversion to useful purposes in accordance with the redevelopment plan. The great weight of authority is that there is no private grant when land is cleared for the purposes herein contemplated and is thereafter sold at a loss, but for its then fair value."

The statute involved in *State* v. *Land Clearance* is substantially equivalent to the statutes under which the Lincoln Square Project was condemned and sold. If anything, the *Land Clearance* statute was less likely to extract "fair value" than the statutes under which the Lincoln Square Project was condemned and sold.

In *People* v. *City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626, the court, in upholding an Illinois slum clearance statute, stated (414 Ill. at 617, 111 N. E. 2d at 636-637):

> "Plaintiff's assumption of a donation to Normandy Homes, Inc., the prospective developer here, is erroneous. Section 19 does permit the Commission to sell land in a project to a developer at 'use value.' This term is defined as 'the value at which the Commission determines such land should be made available in order that it may be developed or redeveloped for the purposes specified in the plan presented.' Sections 3(l) and 14 provide that the land for blighted vacant area redevelopment projects must be developed for predominantly residential uses. The 'use value' will thus be the value of the land, subject to restrictions placed upon it by the statute and the redevelopment plan. In this there is no donation of land to a private corporation, nor is there any loan of credit. The constitutional prohibition is not a bar to a municipality entering into a transaction where there is an exchange of considerations between the parties."

Similarly, in *Velishka* v. *City of Nashua*, 99 N. H. 161, 106 A. 2d 571, the court, in upholding a New Hampshire slum-clearance statute, stated (99 N. H. at 168, 106 A. 2d at 575-6):

> "Section 5 of the act permits the housing authority to sell or lease the land in the project area 'at its use value' which may be less than the cost of acquisition, clearance and site improvements. The sale or lease to private enterprise is required to be made

subject to conditions that will insure that the blighted or slum conditions do not return. * * * The sale or lease is not a gratuity since it is made at its use value as a means of assuring the redevelopment in accordance with the redevelopment plan. Cf. *Opinion of the Justices*, 95 N. H. 548, 65 A. 2d 700. There is no grant of public funds for private purposes in violation of the Constitution since the housing authority may sell or lease the land only at a use value and for uses which are consistent with the continuous use of the redevelopment in accordance with the original public purpose and plans."

See also, *Cremer* v. *Peoria Housing Authority*, 399 Ill. 579, 594-595, 78 N. E. 2d 276, 284-285; *Foeller* v. *Housing Authority of Portland*, 198 Ore. 205, 236, 256 P. 2d 752, 767; and *Gohld Realty Co.* v. *City of Hartford*, 141 Conn. 135, 104 A. 2d 365.

Actually, far from being a subsidy, the differential between the cost of acquisition (or of acquisition and clearance) to the municipal agency and the sales price to the redeveloper results (a) from the fact that the acquisition cost includes not only the value of the land but also the value of the existing buildings which must thereafter be demolished; and (b) from the fact that the redevelopment contract imposes obligations and restrictions upon the redeveloper which lessen the value of the land itself. In the present case and in all other Title I projects in New York City, those obligations include the relocation of residential tenants, the removal of commercial tenants, the demolition of existing buildings and the construction of new improvements. Those restrictions require the redeveloper to use the land and the improvements which it erects only in accordance with the limitations set forth in the applicable redevelopment or renewal plan.

As the foregoing indicates, what petitioners claim is a subsidy is rather a bargained-for equivalent which either arm's length negotiations or a public auction insures is not a subsidy.

(b)

Petitioners contend that, regardless of the propriety of the Title I scheme in general, on the facts of this case Fordham has received a subsidy by its participation in the Lincoln Square Project (petition, pp. 9-11).

While the petition is unclear as to precisely how Fordham has received that subsidy, the petition hints that the subsidy stems (i) from the sponsorship contract between the City and Fordham (petition, p. 11); (ii) from the condemnation of the Collegiate Site (petition, p. 11); and (iii) from the restrictions imposed upon the redevelopment of the Collegiate Site (petition, pp. 5, 6, 10-11).

(i) Clearly, Fordham has not on the facts of this case received a subsidy through the sponsorship contract. The assurance therein that the City would sell the Collegiate Site to Fordham if it were the highest bidder was in no real sense a greater assurance than that granted to any prospective bidder at the public auction of that Site. On the other hand, the contract imposed the steep obligation solely upon Fordham to bid at least $2,241,610 for the Collegiate Site.

(ii) Equally clearly, Fordham has not received a subsidy by the condemnation of the Collegiate Site. The condemnation was an independent act of the City and was legally unrelated to the erection of the improvements contemplated by the Project. Certainly, the condemnation was not for Fordham. If anything, the condemnation was for the subsequent public auction and that auction was not held for Fordham's benefit.

(iii) Finally, Fordham has not received a subsidy through the restrictions on the re-use of the Collegiate Site. Those restrictions require that that Site be used exclusively for educational purposes for a period of forty years. Because of those restrictions, only educational

institutions could bid for that Site. However, that limitation upon the potential bidders for that Site hardly "subsidizes" any one educational institution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL I. ROSENMAN,
Attorney for Respondent
Webb & Knapp Lincoln
Square Corporation.

MAX FREUND,
JEROME L. SINDLER,
LAWRENCE B. BUTTENWIESER,

Of Counsel.

April 9, 1959.

FILE COPY

Office Supreme Court, U.S.
APR 19

Supreme Court of the United States

October Term, 1958

No. 771

[illegible] Appellants,

against

[illegible] Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ROBERT F. WAGNER, ET AL. AND THE CITY OF NEW YORK, RESPONDENTS, IN OPPOSITION

BAR PRESS INC. 32 LAFAYETTE STREET NEW YORK 13 N.Y. - WA 9-8600

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Supreme Court of the United States

October Term, 1958

No. 771

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY, d/b/a Loric Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO., INC., SCHUCKMAN PRESS, INC., 145-147 W. 61ST CORPORATION, individually and on behalf of all others similarly situated,

against *Petitioners,*

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ROBERT F. WAGNER, ET AL. AND THE CITY OF NEW YORK, RESPONDENTS, IN OPPOSITION

Respondents Robert F. Wagner, *et al.*, constituting the Board of Estimate of the City of New York, and the City of New York, for their statement in opposition to petitioners' application for a writ of certiorari, respectfully show the following:

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (reported in 263 F. 2d 244) is set forth in Appendix B to the petition, pp. 26-36.

The opinion of the District Court is reported in 166 F. Supp. 129.

Questions Presented

1. Are any substantial federal questions presented by the following:

(a) Petitioners' contention that the First Amendment bars a grant of Federal funds to the City of New York for use in the Lincoln Square Slum Clearance and Redevelopment Project in view of (1) the final judgment of the New York State Court of Appeals that the First Amendment does not bar the use of City funds for that project (*64th Street Residences Inc.* v. *City of New York*, 4 N Y 2d 268 [1958], (2) the denial by this Court of an application for a writ of certiorari to review that determination (*Harris* v. *City of New York*, 357 U. S. 907 [1958]), (3) the well-established judicial decisions supporting such determinations and (4) Petitioners' concession (Petition, p. 3) of the correctness of the judgment below in dismissing the complaint as to all respondents other than the Federal officials; and

(b) Petitioners' contention that they had the right to a hearing before the Federal Housing and Home Finance Agency?

2. Do petitioners have standing to prevent the expenditure of Federal funds in connection with the Lincoln Square project?

As a result of petitioners' concession of the validity of the City's action in acquiring and reselling the Lincoln Square area for redevelopment by various sponsors including Fordham University, this action seeks merely to enjoin the use of Federal funds for a concededly valid purpose.

Statement

(A) The Lincoln Square Project

The Lincoln Square Urban Renewal Project was adopted by the Board of Estimate of the City of New York on November 26, 1957, pursuant to the provisions of General Municipal Law, §72-K,* enacted in 1945. That statute authorizes municipalities to acquire real property by condemnation or otherwise "necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto."

The statutory procedure followed by the City and upheld by the New York Court of Appeals (*Kaskel* v. *Impellitteri*, 306 N. Y. 73 [1953], cert. den. 347 U. S. 934 [1954]), has been to acquire the real property in a substandard and insanitary area and to resell it at public auction to the highest bidders, who are obligated by the terms of their deeds, to relocate the tenants from the sites, demolish existing structures and redevelop the land upon terms and conditions prescribed by the Board of Estimate and the Federal Urban Renewal Administration. This was the same procedure that had been adopted by the City of New York in each of the eleven prior urban renewal projects (50a-53a**).

The Lincoln Square Project Plan provides for the clearance and redevelopment of a 13-block substandard area on the West Side of Manhattan for the following uses: Collegiate, multi-family residential, commercial, retail, Public and Semi-Public.

---

* This statute is set forth in the Appendix hereto.

** Page references followed by the letter "a" refer to the Appendix to Appellants' Brief in the court below.

There is nothing in the Plan which requires the developer of the collegiate area to be a sectarian institution. By its terms, the Plan permits effectuation by either a non-sectarian or sectarian institution (Urban Renewal Plan annexed to defendants' answer in the *64th Street Residences* case).

(B) The Sponsorship Contract

As part of the preliminary procedures established for slum clearance projects, the Slum Clearance Committee, in a widely advertised program, invited preliminary bids from persons or institutions willing to undertake redevelopment of a site in the proposed Lincoln Square area (R. 14, 15, 153, 166*). Such sponsors included persons or corporations interested in redeveloping for housing, cultural, commercial, collegiate and institutional purposes. The Board of Estimate approved four of five proposed sponsors, including Fordham University, which executed a sponsorship contract approved by the Board of Estimate, whereby it bound itself to make a minimum bid for a portion of the area to be devoted to educational purposes. The price of $7 a square foot, which Fordham agreed to bid, is in excess of the appraised value for collegiate re-use and is equal to the price to be bid by the housing sponsor in the project for the best commercial use for which the Lincoln Square site could be developed (R. 159).

The purpose of the sponsorship contract was merely to assure the City that at least one bidder would make a minimum bid at the public sale and that there would be at least one educational institution interested in clearing and redeveloping the collegiate site (R. 62). This is appar-

* Page references preceded by the letter "R" refer to the Record on Appeal in *64th St. Residences, Inc.* v. *City of New York*, 4 N Y 2d, 268 (1958), cert. den. *sub nom. Harris* v. *City of New York*, 357 U. S. 907 (1958), one of the exhibits in the present action (104a).

ent from its terms, under which *Fordham could not be the redeveloper unless is was the highest bidder at the public auction* (R. 63; Fordham Sponsorship Contract annexed as Exhibit B to defendants' answer in the *64th Street* case, pages 3, 4, 6 and 7). The terms of the Sponsorship Contract also demonstrated that the Project Plan comprehended redevelopment of the collegiate section by *any* educational institution *which might be the highest bidder at public auction* and that it was not limited solely to Fordham as a redeveloper (Fordham Sponsorship Contract, *id.*, pages 3, 4, 6, 7, 12).

Thus, all that the Fordham sponsorship contract did was recognize that Fordham had the same right to bid at public auction as was available to all other institutions, sectarian or non-sectarian, and bound Fordham to make a minimum bid—a term inserted for the protection of the City.

(C) The Capital Grant Contract

On November 26, 1957, the Board of Estimate also approved and authorized the execution of a capital grant contract with the Federal Housing and Home Finance Agency, which approved the project plan and the capital grant contract on December 26, 1957 (20a). In this contract, executed pursuant to Title I, National Housing Act of 1949, 63 Stat. 413, as amended, 42 U. S. C. 1441 *et seq.*, the Federal Agency agreed to reimburse the City of New York to the extent of two-thirds of the difference between the cost of the area acquired by condemnation and the amounts received at the public auction sale.

(D) Prior Court Actions

This is the fifth action brought without success by the opponents of the Lincoln Square Project to have that project declared illegal. In addition to the *64th Street Residences* (*supra*, p. 2), there were *Lochner* v. *City of New York*, 162 N. Y. S. 2d 233 (Sup. Ct., N. Y. Co., 1957), *89 Amsterdam Avenue Corp.* v. *The City of New York*, N. Y. L. J., November 13, 1957, page 7 (Sup. Ct., N. Y. Co.), and *Cohen* v. *City of New York*, N. Y. L. J., August 7, 1958, p. 7 (U. S. D. C., S. D. N. Y.)

While the *64th St. Residences* appeal was pending in the New York Court of Appeals, the City of New York moved for an order of condemnation in the Supreme Court, County of New York. The motion was granted on February 28, 1958 and the order of condemnation, entered on that day, vested title in the City of New York to the project area. On the afternoon of that day, the public auction was held, as previously advertised, and portions of the area were sold to the sponsors at the minimum prices stated in the sponsorshsip contracts (Complaint, Pars. 24, 25; p. 20a).

The trial of the condemnation proceeding commenced on September 29, 1958 and is unfinished as of the present time. Partial condemnation decrees have been entered, in one of which petitioner Schuckman Press, Inc. was awarded $4,250 for its trade fixtures. That amount, plus interest, was paid to it by the City of New York on February 5, 1959.

(E) 64th Street Residences Action

An action entitled, *64th Street Residences Inc.* v. *City of New York*, was commenced on December 2, 1957, in the Supreme Court of the State of New York by certain property owners and residential and business tenants in the Lincoln Square area, suing for themselves and all others similarly situated. Petitioners here are represented by the same attorneys who brought that action. Except for appellees Cole and Fried, the defendants were the same in both actions.

As in the present case, the complaint asked for a judgment invalidating the Lincoln Square project upon the ground that the participation of Fordham University, a denominational school, as a sponsor, and the proposed sale of the collegiate site to Fordham at a price considerably less than the expected cost of the site to the City of New York violated the "establishment of religion" clause of the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment (R. 14-17).

The New York Court of Appeals unanimously affirmed a judgment of the Supreme Court, New York County, dismissing the complaint (*64th St. Residences, Inc.* v. *City of New York, supra*, 4 N Y 2d 268). After reciting the facts, Judge DESMOND described the action as one based upon the contention "that the resale of part of this area [the Lincoln Square project site] to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of $3,500,000 in violation of Section 7 of Article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions" (4 N Y 2d, at p. 275).

"The argument however," the Court stated, "proceeds on an assumption false in fact" (*ibid.*). The false assumption is that Fordham acquired at public auction the same property that the city acquired in condemnation. As the Court of Appeals pointed out, "what the City is buying is not the same as what Fordham is buying. The City buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. • • • Therefore, there is no substance to the assertion on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property" (p. 276).

An application for a writ of certiorari brought by those plaintiffs in the *64th St. Residences* action who were residential and business tenants was denied by this Court on June 9, 1958. (*Harris v. City of New York, supra,* 357 U. S. 907.)

(F) The Gart Action

On June 17, 1958 the petitioners instituted the *Gart* action in the District Court for the Southern District of New York. As in the *64th St. Residences* action, the plaintiffs were property owners and residential and business tenants in the area, suing for themselves and all others similarly situated (9a, 33a).

The defendants were the same as in the *64th St. Residences* action with the addition of Albert M. Cole, Administrator, and Walter S. Fried, New York Regional Administrator, of the Federal Housing and Home Finance Agency. As to the City of New York and the redevelopers, the complaint contained the same allegations of unconstitutionality as in the prior action and asked for the same judgment declaring the Lincoln Square Project illegal (104a, 114a-116a).

As to the federal officials, the complaint asked for judgment declaring the Administrator's approval of the project illegal and enjoining him from expending any federal moneys pursuant to the capital grant contract. The grounds of alleged illegality were that in denying plaintiffs Schuckman and Howdibon and others the opportunity to be heard with respect to the approval of the Lincoln Square Project, the Administrator violated the provisions of the Housing Act of 1949, 42 U.S.C. §§1441 et seq., §5 of the Administrative Procedure Act of 1946, 5 U.S.C. §1004, and the due process clause of the Fifth Amendment (Par. 30, pp. 22a-23a); that in denying them a hearing he illegally delegated to the New York City Planning Commission his authority to determine whether or

not the City had submitted a "workable program" of slum elimination, as required by §101 (c) of Title I of the Housing Act, 42 U.S.C. §1451 (c) (Par. 31, 23 a); that his approval of the Lincoln Square project, which included Fordham University as the sponsor of the Collegiate area, was in violation of the establishment of religion clause of the First Amendment (Par. 32, p. 24a).

The District Court (DIMOCK, J.) granted the defendants' motion for summary judgment in an opinion reported in 166 F. Supp. 129. The Court held that the judgment in the *64th St. Residences* action was *res judicata* as to the constitutionality of the Lincoln Square project (166 F. Supp., at pp. 131-133). The Court of Appeals affirmed the judgment of dismissal. Writing for a unanimous Court, Chief Judge CLARK held (Appendix "B" to Petition, p. 28 *et seq.*):

1. "As members of the classes of plaintiffs represented in the *64th Street Residences* case, appellants are barred by the judgment there from relitigating these issues with these defendants in the New York courts. *Ashton* v. *City of Rochester*, 133 N. Y. 187, 195, 30 N. E. 965, 31 N. E. 834, 28 Am. St. Rep. 619; *People's Gas & Elec. Co. of Oswego* v. *City of Oswego*, 207 App. Div. 134, 202 N. Y. S. 243, affirmed 238 N. Y. 606, 144 N. E. 911; *Campbell* v. *Nassau County*, 192 Misc. 821, 82 N. Y. S. 2d 179, affirmed 274 App. Div. 929, 83 N. Y. S. 2d 511. And the full-faith-and-credit clause requires a federal court to give equal effect to that judgment as a bar to relitigation of these issues. *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 86 A. L. R. 298; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 150 A. L. R. 413. See also *McIntosh* v. *City of Pittsburgh*, C. C. W. D. Pa., 112 Fed. 705." (*Id.*, p. 29)

2. "The first claim [against Appellees Cole and Fried] but repeats the one so strongly asserted against

the City and the project sponsors in the state case. The first amendment's requirement of the separation of church and state applies equally to the state and federal government * * * (citing cases)." (p. 32)

3. "As to both governments, the basic issue concerns the transaction between the City and Fordham University. Moreover, the City's use of federal funds was considered by the New York Court of Appeals in its opinion in *64th Street Residences* and was heavily stressed by the plaintiffs there in the petition for certiorari. And as a practical matter, the relief appellants seek in this action against the FHHFA will curtail the progress of the Lincoln Square Urban Renewal Project as effectively as the direct injunctive relief against the active Project participants unsuccessfully sought in the New York courts. These appellees have once successfully litigated this issue to a final judgment. In these circumstances there can be no doubt but that the New York courts would not permit this relitigation of the same issue. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97; *Good Health Dairy Products Corp. of Rochester, N. Y.* v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758, 112 A. L. R. 401. See also *Kessler* v. *Eldred*, 206 U. S. 285. *Hence it is barred here.*" (Emphasis added.) (p. 32)

4. "Plaintiffs do have standing in this action to challenge the Administrator's refusal to grant them an oral hearing on the feasibility of the City's relocation plan. *But there is no basis, statutory or otherwise, for the right to appear and be heard before the Administrator which appellants claim.*" (Emphasis added.) (p. 34)

Judge CLARK held that the Housing Act does not require the Administrator to hold an oral hearing on the project plan. He noted that the Act does require public

hearings before the municipal authorities. (Such public hearings were in fact held. Complaint, Par. 18, Par. 30, 18a.) "Here," he concluded, "the FHHFA afforded appellants opportunity to submit documentary information on the plan's feasibility. More than this the Housing Act does not require." (Appendix "B", p. 35).

The Court noted that the Housing Act contains no express requirement of an open adjudicative hearing and that §5 of the Administrative Procedure Act, 5 U. S. C. §1004 applies only to "a case of adjudication required by statute to be determined upon the record after opportunity for agency hearing" (Appendix "B", p. 35).

With respect to procedural due process the Court said (Appendix "B", p. 36):

> "The Administrator's review of the proposal for relocation here lacks the direct impact of the deportation of an alien in *Wong Yang Sung* v. *McGrath*, supra, 339 U. S. 33, or the denial of a certificate of public convenience to a public carrier in *Riss & Co.* v. *United States*, 341 U. S. 907, or the denial of an individual citizen's right to use the mails in *Cates* v. *Haderlein*, 342 U. S. 804, and *Door* v. *Donaldson*, D. C. Cir., 195 F. 2d 764—cases on which appellants rely."

POINT I

No substantial question with respect to the First Amendment is presented.

A. The participation of Fordham University in the Lincoln Square project does not violate the First Amendment.

The first question presented by the petition is the same as that stated in the petition for certiorari which this Court denied in *Harris* v. *City of New York, supra,* 357 U. S. 907. There this Court declined to review the determination of the New York courts that the designation by the City of New York of Fordham as a sponsor of the collegiate site and the sale to Fordham of that site did not violate the First Amendment. *64th St. Residences, Inc.* v. *City of New York, supra,* 4 N Y 2d 268.

That determination is in accord with this Court's statement in *Berman* v. *Parker,* 348 U. S. 26, 34-35 (1954). It is also in accord with the history and practice of neighborhood planning and redevelopment (R. 50-59) and with the holdings of this and other courts that denominational institutions must be afforded equal right to participate in the benefits of zoning legislation. *Village of University Heights* v. *Cleveland Jewish Orphan Home,* 20 F. 2d 743 (6th Cir., 1927); cert. den. 275 U. S. 569 (1927); *Matter of Diocese of Rochester* v. *Planning Board,* 1 N Y 2d 508, 522 (1956); *Matter of Community Synagogue* v. *Bates,* 1 N Y 2d 445, 458 (1956). It is also based upon the principles that religious institutions may deal at arm's length with a governmental agency; that where there is an exchange of considerations, there is no gift or subsidy; and finally, that a denial of this right to deal with governmental agencies on this basis would be a denial of the rights of the religious institution under the First Amendment. A fundamental aspect of the protection provided by

the First Amendment is found in those cases in which this Court has held that public welfare legislation, such as the slum clearance statute here involved and the acts taken thereunder, which extends the general benefits of State law "to all its citizens without regard to their religious belief", is not to be considered as an establishment of religion. *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947); cf. *Zorach* v. *Clauson*, 343 U. S. 306, 312-313 (1952).

While professing acceptance of these principles, the petitioners nevertheless claim to find their violation in the circumstances of this case, because Fordham acquired the educational site at a price less than its estimated cost to the City. Their contention, however, is based, as the New York Court of Appeals found, upon "an assumption false in fact" (*infra*, p. 7). The petitioners have sought to equate two dissimilar items. What the religious institution acquires at public auction is not the same thing that the municipality acquires upon condemnation of the private site. The municipality pays the private owners the full market value of the buildings and land unrestricted as to use, as of the date of acquisition. What the religious institution or any other redeveloper buys at public auction is land which, under the terms of the sale, it must clear and redevelop for the purpose required by the plan. To do this, it must relocate present occupants, raze the buildings and erect new structures to conform to the site plan, all within time limits fixed by the plan. The land it acquires is also burdened by a restriction limiting its use to educational purposes. Obviously, therefore, the acquisition cost to the City for elimination of a slum is wholly unrelated to the value of the real property as resold to the redeveloper. Moreover, as the New York Court of Appeals noted, the price paid by Fordham exceeds the reuse value of the land as restricted to educational purposes. Consequently, there has been a fair exchange of considerations which removes this transaction from the ban of the First Amendment (4 N Y 2d, at p. 276).

This false assumption of the petitioners stems from their refusal to recognize that the difference between the cost of acquisition to the municipality and the price paid by the redeveloper at public auction does not represent a gift or subsidy to the redeveloper but is rather a measure of the cost of accomplishing the valid municipal purpose of clearing a slum area and providing for its redevelopment in a manner which will prevent recurrence of the blight. So the courts have held throughout the nation wherever this question has arisen. *State* v. *Land Clearance Commission*, 270 S. W. 2d 44, 53 (Sup. Ct. Mo., 1954); *Gremer* v. *Peoria Housing Authority*, 78 N. E. 2d 276, 284 (Sup. Ct., Ill., 1948); *People* v. *City of Chicago*, 111 N. E. 2d 626, 636 (Sup. Ct. Ill., 1953); *Foeller* v. *Housing Authority of Portland*, 256 P. 2d 752, 767 (Sup. Ct. Ore., 1953); *Velishka* v. *City of Nashua*, 106 A. 2d 571, 575, 576 (Sup. Ct. N. H., 1954); *Gohld Realty Co.* v. *City of Hartford*, 104 A. 2d 365, 370 (Sup. Ct. of Errors, Conn., 1954).

On the merits, therefore, there is no substantial basis for petitioners' reliance on the First Amendment. This Court's denial of certiorari in the *Harris* case and the ruling of the Court below sustaining the constitutionality of the City's acts—which petitioners do not challenge—require a like ruling with respect to the acts of the Federal Agency. As the Court below held, citing *Zorach* v. *Clauson*, 343 U. S. 306, 309 (1952), *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947), and *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), the First Amendment has equal impact upon the states and the Federal Government (Appendix "B", p. 32).

If anything, the City's acts were more extensive than those of the Government. The City promulgated the Lincoln Square project, established a collegiate re-use for a portion of the project site, accepted Fordham as the sponsor of the collegiate area and sold that area to Ford-

ham at public auction. The Federal Agency merely approved the project and agreed to reimburse the City for part of the cost of slum clearance. The First Amendment, made applicable to the states by the Fourteenth Amendment, forbids *all* governmental aid in the establishment of religion, whether by the Federal Government, the states, or political subdivisions of the states. The ban of the First Amendment is neither greater nor less on one governmental entity than on any other. If the City may lawfully spend public funds in consummation of the Lincoln Square project, as the Courts have held and petitioners no longer dispute, the expenditure of federal funds is equally lawful.

B. The Full Faith and Credit provision of the Constitution and statute (28 U. S. C., Sec. 1738) barred the petitioners from relitigating the issue of constitutionality of the Lincoln Square project in this action.

The complaint in the *64th St. Residences* action alleged that the Lincoln Square project violated the First Amendment and asked for a judgment declaring the project illegal and restraining the City of New York from expending its funds in connection with the project and from further processing the project plan with the Federal Agency (R. 20-22). In the *Gart* action the complaint alleged the same unconstitutionality (104a, 114a-116a) and asked for the same judgment of illegality, restraining the City from expending any of its funds or funds received from the Federal Agency and restraining the Federal Agency from expending any funds of the Government in carrying out the project (28a, 30a).

In the courts below the question as to whether the prior state court action was a real class action so as to be binding on the *Gart* plaintiffs was extensively briefed. The Court of Appeals, affirming the District Court, held the prior action to have been a real class action and the judgment therein binding on the present petitioners so as to bar them from relitigating the issue of constitutionality with the defendants who had been sued in the prior action

(Appendix "B", pp. 29-31). With this determination petitioners have no quarrel (Petition, pp. 2-3).

The Full Faith and Credit clause (Art. 4, Sec. 1) of the Constitution and the federal legislation pursuant thereto (28 U. S. C., Sec. 1738, 62 Stat. 947) require federal courts to give state court judgments the same force and effect as are given them by state courts. *Oklahoma Packing Co.* v. *Gas Co.*, 309 U. S. 4, 11 (1940). The judgment in the *64th St. Residences* action having established the constitutionality of the Lincoln Square project and the propriety of the expenditure of public funds by the City, the New York courts would not permit a relitigation of the same issue with respect to the expenditure of public funds by the Government in partially reimbursing the City: *Israel* v. *Wood Dolson Co.*, 1 N.Y 2d 116 (1956); *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14 (1937); *Cohen* v. *Dana*, 275 App. Div. 723 (2nd Dept., 1949), aff'd 300 N. Y. 608 (1949); *Eissing Chemical Co.* v. *People's Nat. Bank of Brooklyn*, 205 App. Div. 89 (2nd Dept., 1923), aff'd 237 N. Y. 532 (1923).

These cases were based upon the same principle of estoppel by judgment or *res judicata* pronounced by this Court in *United States* v. *California Bridge Co.*, 245 U. S. 337, 341 (1917).

The constitutional issue was the same in both actions and both complaints asked for a judgment restraining the expenditure of public funds—City funds in the state court action and City and Federal funds in this action. Moreover, the prior complaint sought to restrain the City from applying for federal moneys (R 21-22) and, as the Court below pointed out (Appendix "B" p. 32), the City's use of federal funds "was heavily stressed by the plaintiffs there [in the *64th St. Residences* case] in the petition for certiorari." (See Petition, *Harris* v. *City of New York*, *supra*, 357 U. S. 907, pp. 13-16, particularly p. 16, where it was said, "Directly affected is the Federal Government, which will be required to shoulder two-thirds of a direct subsidy of about 3½ million dollars to a religious institution.")

Therefore, both substantively and on the basis of the Full Faith and Credit clause of the Constitution, the first question presented by petitioners does not warrant consideration by this Court.

POINT II

Petitioners were not entitled to a hearing under any statutory or constitutional provision.

(a)

Paragraph 30 of the complaint alleges that the Federal Housing and Home Finance Agency violated the provisions of the Housing Act of 1949, as amended, and Section 4 of the Administrative Procedure Act of 1946 when it denied to the plaintiffs Schuckman Press, Inc. and Howdibon Garage Co., Inc. and others an opportunity to intervene and be heard with respect to the approval of the Lincoln Square Urban Renewal Project.

This contention misconceives the purpose and intent of Section 4 of the Administrative Procedure Act of 1946 (5 U. S. C. §1004). In *Bersoff* v. *Donaldson*, 174 F. 2d 494, 495 (U. S. C. A., Dist. of Col. Cir., 1949), the Court stated that Section 4 "confines the prescribed procedure to cases of adjudication '*required by statute* to be determined on the record after opportunity for agency hearing' " (emphasis in original). Where the statute does "not in terms require a hearing", it does not "come within the scope of the procedural provisions of the Administrative Procedure Act." See also, *Gardner* v. *United States*, 239 F. 2d 234 (5th Cir., 1956); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (Dist. of Col. Cir., 1955), cert. den. 350 U. S. 884 (1955); and *Lesser* v. *Humphrey*, 89 F. Supp. 474 (U. S. D. C., M. D. Pa., 1950), where it was held that the Administrative Procedure Act is inapplicable

where the statute involved does not require an agency hearing even though one is had as a matter of grace.

Whether or not the petitioners were entitled to a hearing depends, therefore, upon the provisions of Title I of the Housing Act of 1949. That Title will be searched in vain for any provision requiring a public hearing by the agency before it may approve applications by local governing bodies for the grant of federal funds in aid of slum clearance. Indeed, where hearing is required it is clearly set forth. See, e. g., 42 U. S. C. §1455(d) which states that no land for any project to be assisted under this Title shall be acquired by the local public agency except after public hearing following notice of the date, time, place and purpose of such hearing.* The absence of provisions for hearings by the Federal Housing and Home Finance Agency, especially in view of the clear declaration of necessity for hearing by the local public agency, can only mean that it was the legislative intent not to require that the federal agency conduct hearings before granting its approval for such project.

(b)

Petitioners rely upon the decisions of this Court holding that a hearing is required even in the absence of a requirement in a statute where the adjudication involves life, liberty or property, *i.e.*, where such a hearing is required by the due process clause of the Fifth Amendment. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), and the other cases cited by petitioners (Brief, p. 13) and discussed by Judge CLARK in his opinion (Appendix "B", p. 36).

But petitioners have not been deprived of their property by any act of the Administrator. Their property has been taken by the City of New York in the now concededly

* Such hearings were in fact held. (Complaint, pars. 18, 20, pp. 18a-19a).

lawful exercise of its power of eminent domain. It is well settled that where private property is acquired for a public use, due process does not require a hearing on the necessity or expediency of the taking. It is only essential that the mode of determining the compensation to be paid is such as to afford the owners an opportunity to be heard. *Bragg* v. *Weaver*, 251 U. S. 57 (1919); *Sears* v. *City of Akron*, 246 U. S. 242, 251 (1918); *Georgia* v. *Chattanooga*, 264 U. S. 472, 483 (1924). The trial of the Lincoln Square condemnation proceeding is now in progress and it will not be disputed that petitioner Schuckman has already been paid the compensation fixed by the Court for its property.

POINT III

Petitioners have no standing to sue to prevent the disbursal of federal funds.

The only respondents against whom petitioners seek relief are the officials of the Federal Housing and Home Finance Agency (Petition, p. 3). The relief sought is an injunction restraining them from committing federal moneys in furtherance of the Lincoln Square Urban Renewal Project. However, since that project is concededly lawful it is well settled that such an action may not be maintained. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940); *City of Atlanta* v. *Ickes*, 308 U. S. 517 (1939); *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Allied-City Wide, Inc.* v. *Cole*, 230 F. 2d 827 (D. C. Cir., 1956).

In the Court below petitioners acknowledged the validity of the principle stated in *Allied-City Wide* v. *Cole*, *supra*. Their answer to it was as follows (Appellant's Brief, p. 33):

> "Just as it is true that one who will be injured by another's lawful use of money has no standing to assert that a third person's action in providing that

money will be illegal', *Allied City-Wide Inc.* v. *Cole* (D. C. Cir.), 230 F. 2d 827, 828, it is equally true that one who will be injured by another's unlawful use of money has standing to enjoin a third person's illegal action providing it. See, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 484-485; *Frost* v. *Corporation Commission*, 278 U. S. 515; cf. *Worthington* v. *Commodity Credit Corp.* (D.C. E.D. N.C.), 157 F. Supp. 497, 504-505. Therefore, in order to determine appellants' standing to challenge the constitutionality of the Federal Housing Administrator's action, this Court must first make an independent determination as to the validity of the City's action challenged as unconstitutional."

As has been noted, the determination by the Court of Appeals sustaining the constitutionality of the City's action in promulgating the Lincoln Square project and in condemning the project area is no longer challenged by petitioners. By their own reasoning, therefore, they have no standing to maintain this action.

Parker v. *Fleming*, 329 U. S. 531 (1947) is cited by petitioners (p. 15) as authority for their standing to sue the Federal Housing and Home Finance Agency. In that case, after the Price Administrator directed that an eviction certificate be issued to a landlord, the tenants filed a "protest" as permitted by the Emergency Price Control Act, §203(a), 56 Stat. 31, 50 U. S. C. App., §923(a). When their protest was denied, they sought judicial review of the denial in the Emergency Court of Appeals, pursuant to §204(a) of the Act, 56 Stat. 31, 50 U. S. C. App §924(a).

This Court held that the tenants were "subject to" a provision of a regulation or order of the Price Administrator and thus had standing to file the protest. It held further, that the tenants were persons "aggrieved" by the denial of their protest and could, therefore, seek review

of the order in the Emergency Court of Appeals (329 U. S., at pp. 533-534).

The distinction between *Parker* v. *Fleming* and the instant case is at once apparent. The National Housing Act of 1949, as amended, makes no provision for judicial review of the Administrator's action. The language of the Emergency Price Control Act, giving the tenants standing both to protest and to sue, has no counterpart in the National Housing Act. In the absence of such language, petitioners have no standing to sue. Cf. *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 135-139 (1947). They are precisely in the same position as the plaintiffs in the *Allied-City Wide* case *supra*, p. 19.

CONCLUSION

The petition for writ of certiorari should be denied.

April 9, 1959.

Respectfully submitted,

LEO A. LARKIN,
Acting Corporation Counsel,
Attorney for Robert F. Wagner, et al. and The City of New York, Respondents.

PAULINE K. BERGER,
BENJAMIN OFFNER,
ANTHONY CURRERI,
Of Counsel.

APPENDIX

General Municipal Law, §72-k:

"§72-k. Acquisition of real property for clearance and rehabilitation; sale or lease of property for such purposes.

1. The governing board or other appropriate authority of a municipal corporation may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special, or local law applicable to the acquisition, of real property by such municipal corporation, real property or any interest therein necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto.

2. In addition to employing any other lawful method of utilizing or disposing of any real property or any interest therein owned by a municipal corporation, or acquired by it pursuant to subdivision one of this section, such municipal corporation, acting through its board of estimate or other governing body, may sell, lease for a term not exceeding ninety-nine years, or otherwise dispose of any such real property to any person, firm or corporation at the highest marketable price or rental at public auction or by sealed bids pursuant to the provisions of any general, special or local law applicable to the sale or disposition of real property by such municipal corporation, for the purpose of clearance, replanning, reconstruction and neighborhood rehabilitation by the purchaser of such real property in substandard and insanitary areas, in such manner as may be prescribed by the board of estimate or other governing body. Any deed, lease or instrument by

which real property or any interest therein is conveyed or disposed of in, such manner shall contain provisions requiring the purchaser or grantee to clear, replan, reconstruct or rehabilitate such property in such manner as may be prescribed by the board of estimate or other governing body, and provisions insuring the use of such real property for purposes consistent with the clearance, replanning, reconstruction and neighborhood rehabilitation of substandard and insanitary areas. Such deed or instrument may contain such other provisions, conditions and restrictions, including specifications relating to clearance, replanning, reconstruction, and rehabilitation as may be prescribed by the board of estimate or other governing body. The prior consent of the city planning commission or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area.

3. In proceeding under this section in addition to all other powers which it may exercise, a municipal corporation, acting through its board of estimate or other governing body, may: (1) cooperate with the federal government and apply for and accept financial assistance, loans and grants, as provided in title I of the housing act of nineteen hundred forty-nine and all federal laws amendatory and supplemental thereto; (2) provide local grants-in-aid in the form of municipal services and facilities as provided under such federal laws; (3) contract with the federal government as provided under such federal laws including agreements to comply with (a) provisions requiring

payment of not less than certain minimum salaries and wages to architects, engineers, technicians, laborers, mechanics and other personnel; (b) provisions prohibiting rebates and kick-backs; (c) provisions requiring contractors and subcontractors to furnish reports and other data to the secretary of labor; and (d) such other provisions, covenants and conditions as the federal agency may deem necessary or desirable for effectuating the federal purposes; (4) issue bonds or other obligations for the acquisition of the property in the same manner as for the acquisition of property for other public purposes. The period of probable usefulness of such purpose is hereby determined to be fifteen years; (5) provide, in the discretion of the board of estimate or other local governing body, for clearance of the property by the municipality or by the person, firm or corporation to whom such property is sold or leased. In the event that clearance is provided by the municipality, the cost of such clearance shall be financed in the same manner as acquisition costs."

BRIEF FOR THE RESPONDENTS ALBERT M. COLE AND WALTER S. FRIED IN OPPOSITION

FILED
APR 16 1959
JAMES R. BROWNING, Clerk

No. 771

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY, d/b/a Loric Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO., INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,
Petitioners

v.

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency; WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS ALBERT M. COLE AND WALTER S. FRIED IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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BRIEF FOR THE RESPONDENTS ALBERT M. COLE AND WALTER S. FRIED IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 156a-165a) is reported at 166 F. Supp. 129. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. B) is at 263 F. 2d 244.

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1959. The petition for a writ of

certiorari was filed on March 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Federal Government's financial participation in a local slum clearance program, pursuant to which Fordham University in accordance with its contractual obligations as a project sponsor purchased at public auction a portion of the project site for development for university purposes, constituted a violation of the First Amendment to the United States Constitution.

2. Whether the petitioners were denied a hearing to which they were entitled in circumstances where New York City officials held public hearings on a plan of redevelopment and where the Administrator of the Housing and Home Finance Agency received and considered the petitioners' protests regarding the feasibility of the plan for relocating families displaced from the project area but did not hold a formal hearing as a basis for his approval of the plan as meeting the requirements of the Act.

STATUTES INVOLVED

Title 1, Section 105(d), of the Housing Act of 1949, 63 Stat. 416, as amended, 42 U.S.C. 1455(d), provides:

> No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing.

Section 5 of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. 1004, provides:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *.

STATEMENT

This action was instituted by the petitioners, a group of tenants and owners of premises in the Lincoln Square area in New York City, to enjoin the Administrator of the Housing and Home Finance Agency ("HHFA") from continuing the Federal Government's financial participation in the Lincoln Square urban redevelopment project.

1. *The Housing Act of 1949.* In the interest of "the general welfare and security of the Nation and the health and living standards of its people * * *", Congress in 1949 enacted a program for "the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas * * *." 63 Stat. 413, 42 U.S.C. 1441. To achieve this objective, Congress authorized the Administrator of the HHFA to make grants and loans to local public agencies which submitted plans for slum clearance and urban redevelopment. 42 U.S.C. 1452, 1453. No loan or grant, though, may be made available unless the Administrator first determines that the proposed redevelopment program is "workable" (42 U.S.C. (Supp. V) 1451(c)), including a "feasible" method for temporarily relocating families who are to be displaced from the urban renewal area (42 U.S.C. (Supp. V) 1451(c), 1455(c)).

2. *The Lincoln Square Redevelopment Project.* In 1954, local officials in New York City declared the Lincoln Square area, on the west side of the Borough of Manhattan, to be "substandard and insanitary." *64th St. Residences* v. *City of New York*, 4 N.Y. 2d

268, 274. Thereafter, in accordance with Article XVIII of the New York State Constitution and Section 72k(3) of the New York General Municipal Law, the City authorities drew up a redevelopment plan covering a 13 block area. *Ibid.* The plan contemplated the division of the redevelopment area into major project sites for the purposes of housing, a collegiate center, and a performing arts center (R. 34a). Before submitting this plan to the HHFA to secure federal financial assistance, the City designated a sponsor for each of these sites: the respondents Webb & Knapp Lincoln Square Corporation, Fordham University, and Lincoln Center for the Performing Arts, Inc., respectively (R. 37a). Each of these sponsors agreed that, at a public auction of the project land, it would bid a minimum stipulated amount. In return, the City agreed to acquire the land for each site and to sell the land at public auction. The sponsors were not assured that they would be able to purchase the land for the minimum amount they had agreed to bid; on the contrary, the land was to be sold to the highest bidder at the auction, whether that bidder was a sponsor or another person or institution (R. 37a).

On November 12, 1956, various tenants and property owners in the project area, including several of the present petitioners, filed with the HHFA a petition, together with an extensive memorandum, seeking permission to intervene in the Administrator's consideration of the qualification for federal assistance of the City's proposed project (R. 63a-67a). In this petition and memorandum, they set forth in great detail their objections to the relocation procedures which had been adopted by the City. Receipt of their petition was

acknowledged by the agency (R. 68a). In addition, the agency advised the petitioner that "in making available Federal financial assistance for slum clearance and urban renewal projects, [the HHFA] is always seeking to assure itself as to the legality and eligibility of the Project. This information furnished by you will be considered with other documentation when the application for loan and grant is reviewed by our New York Regional Office." No formal intervention was granted and no further hearing was held by the Administrator (R. 68a).

On August 22, 1957, the Board of Estimate of the City of New York referred the final project plan to the New York City Planning Commission for approval (R. 18a). Public hearings were held on September 10, 1957, at which the charge was made that the sale of the property to Fordham University, at a price lower than that paid for it by the City of New York, would constitute a subsidy to a religious institution in violation of the Federal Constitution (R. 18a). On September 11, 1957, the City Planning Commission approved the project. On November 26, 1957, the Board of Estimate, after further hearings,[1] approved the plan, including the acquisition of the area by condemnation, the execution of a capital grant contract with the Housing and Home Finance Agency and the agreements with the various sponsors (R. 20a, 21a).

The City's plan was then submitted to the HHFA, which approved the project and agreed to pay two-thirds of the difference between what the City paid for the land and the amount it received at the auction

[1] At least four public hearings on the redevelopment plan were conducted by City officials before the Board of Estimate finally approved the proposed program (R. 36a).

(R. 35a, 156a). On February 28, 1958, the City took title to the project area by condemnation, and, by public auction, sold the various parcels to project redevelopers (R. 37a). Fordham University was the only bidder for the educational site and, consequently, it bought the land for the previously stipulated minimum price of seven dollars per square foot (R. 37a, 44a).[2] Fordham agreed, as a condition of the sale, to raze the buildings on the site, relocate the tenants and use the cleared land only for a university campus and buildings. (R. 105a).

3. *Prior Litigation.* In November, 1956, prior to the date that the Board of Estimate approved the project, a group of owners and tenants, including one of the petitioners in the present action, sued to enjoin the City from proceeding with the project. Counsel for the plaintiffs was the same attorney who represents the petitioners here. The New York Supreme Court in March, 1957, dismissed the complaint as premature. *Loebner* v. *City of New York*, 162 N.Y.S. 2d 233. A second action, brought seven months after *Loebner* had been dismissed, by a property owner represented by the same counsel, was dismissed on November 18, 1957 (R. 108a, 134a).

On December 2, 1957, a third action was instituted by a group of owners and tenants against the City of New York and a number of City officials (R. 109a,

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[2] Originally the minimum price for the educational site had been set at five dollars per square foot. However, this was raised to seven dollars after a special appraisal by HHFA appraisers, which was occasioned in part by the "nation-wide public concern that a religious institution might be publicly subsidized by the sale of land for its use at less than fair [market] value." (R. 49a).

134a). Again the plaintiffs were represented by the same counsel who represents the petitioners here. Three of the project sponsors, Fordham University, Lincoln Center for the Performing Arts, and Webb & Knapp Lincoln Square Corporation, all respondents in the present proceedings, intervened as defendants. The defendants' motions for summary judgment were granted by the Special Term of the Supreme Court and the Appellate Division of that court unanimously affirmed. *64th St. Residences* v. *City of New York*, 5 App. Div. 2d 824. On further appeal, the New York Court of Appeals unanimously affirmed the determination of the Appellate Division, 4 N.Y. 2d 268. In answer to the appellants' contention that Fordham University had received a government subsidy, the court stressed that every appraisal of the land, subject to the use restrictions imposed by the City, reported a figure lower than the minimum amount which Fordham had agreed to pay. *id.* at 276. In short, the court held that the guaranteed minimum price was a least equal to the market value of the property purchased. *Ibid.*

The appellants then petitioned this Court for a writ of certiorari on the ground that the City's sale of land to Fordham University constituted a violation of the First and Fourteenth Amendments to the United States Constitution. The petition was denied, *sub nom. Harris* v. *City of New York*, 357 U.S. 907.[3]

[3] While the *64th St. Residences* case was on appeal in the New York courts, a fourth action to enjoin the project was instituted in the United States District Court for the Southern District of New York by a group of tenants and owners, again represented by the same counsel (R. 110a). The District Court stayed the proceedings and eventually dismissed them at the same time that the complaint in the present action was dismissed (R. 110a, 170a).

4. *This Litigation.* Seven days after this Court denied the petition for a writ of certiorari in *64th St. Residences,* the present petitioners, represented by the same counsel who appeared in the first four unsuccessful attacks upon the project, instituted this action in the United States District Court for the Southern District of New York. Included among the defendants, for the first time, were respondents Cole, the Administrator of the Housing and Home Finance Agency, and Fried, the Regional Administrator. The complaint advanced the same constitutional objections which had been rejected by the New York State courts in *64th St. Residences.* In addition, petitioners contended that they had been unlawfully deprived by the HHFA of an opportunity to "intervene and be heard" on the workability of the project plan. Accordingly, they prayed for an injunction to prevent the respondent HHFA officials, and each of the other named respondents, from continuing their participation in the project (R. 8a-31a).

Each of the respondents moved for summary judgment and for dismissal of the complaint for failure to state a claim (R. 96a-137a). The motion on behalf of the HHFA respondents was grounded also on improper venue and the failure to obtain jurisdiction over an indispensable party, Administrator Cole (R. 96a-100a). The District Court awarded summary judgment and dismissed the complaint (R. 156a-165a).

The Court of Appeals unanimously affirmed (R. 168a-178a). It held that the petitioners were barred by the judgment in *64th St. Residences* from relitigating the constitutional issues there decided against them (R. 171a-173a). It determined that this bar extended also to the petitioners' asserted constitutional

objections to the Federal Government's participation in the project since, under New York law, the *64th St. Residences* judgment barred relitigation of those contentions against strangers to the earlier action (R. 173a-174a). As to the respondent HHFA officials, the court, rejecting the Government's argument to the contrary, held that venue was properly laid in the Southern District of New York and that the court had jurisdiction over all indispensible parties (R. 174a-176a). But with respect to the petitioners' contention that they were unlawfully denied an oral hearing in which to challenge the feasibility of the City's relocation plan, the court held that Section 5 of the Administrative Procedure Act, which requires a hearing in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing", was inapplicable to the Administrator's consideration of the relocation program (R. 177a-178a). This is so, it reasoned, because the Administrator's consideration is not an "adjudication" of individual rights and also because there was no requirement in the Housing Act for a hearing.[4]

ARGUMENT

The present litigation is the fifth attempt by Lincoln Square area property owners and tenants to block the progress and completion of the Lincoln Square rede-

[4] With respect to petitioners' additional contention that the sale at public auction of project land to sponsors at negotiated minimum bids was not permitted by the Housing Act, the court held that they lacked standing to assert it (citing *Massachusetts* v. *Mellon*, 262 U.S. 447; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931-932 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Allied-City Wide* v. *Cole*, 230 F. 2d 827 (C.A. D.C.), (R. 176a). This contention has not been renewed in this Court.

velopment project. Furthermore, this petition constitutes the second endeavor by the petitioners, or members of the class they represent, to obtain review by this Court of decisions sustaining the validity of the project. Just as this Court declined to review the decision in *64th St. Residences,* so, too, the present petition for certiorari (which raises, in part, the same contentions involved in that case) should be denied. There is no substantial question involved nor any conflict between the decision of the court below and prior decisions of this Court or of other courts of appeals.

1. In substance, petitioners suggest that the sale of project land to Fordham violated the First Amendment because Fordham paid less to New York City than the City originally paid in acquiring the property (Pet. 9-11). This argument, which glosses over the fact that the land was bought at public auction and subject to reuse restrictions imposed by the City, is, for all intents and purposes, precisely the contention made by the petitioners and rejected by the Court of Appeals in the earlier *64th St. Residences* case. 4 N.Y. 2d 268, 269.

Moreover, petitioners' assertion is without merit. In *Berman* v. *Parker*, 348 U.S. 26, 34-35, this Court observed that it is "within congressional power" to permit federal funds to be employed in connection with an urban redevelopment plan which makes provision for schools and churches as well as for houses, parks and shopping centers. Accordingly, it is beyond question that the participation by Fordham University in the Lincoln Square project was not *per se* violative of the

First Amendment. Petitioners seemingly suggest, however, that the *Berman* decision does not mean that a religious institution may "participate as urban redevelopers, and pay less than market value, or even nothing, for the land which [it] redevelop[s]." (Pet. 11.) Whether petitioners are right in this belief is of no moment here. This is because the facts of their hypothetical case clearly do not describe the present case.

a. The petitioners' major error is their implicit assumption that the market value of the land purchased by Fordham is reflected by the price paid by the City in buying up the slum property. As the New York Court of Appeals in *64th St. Residences* properly stressed, the use-restricted property purchased by Fordham was not the same as the unrestricted property purchased by the City. On the contrary, "The city [bought] land and buildings. Fordham [bought] the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only." 4 N.Y. 2d 268, 275, 276. In light of these conditions and restrictions, it could have come as no surprise that the purchase price paid by Fordham was well below the cost to the City. And, since Fordham was not outbid at the public auction of the use-restricted land, the price which it paid may fairly be said to represent at least market value.

b. Moreover, since the New York courts, in *64th St. Residences*, held that Fordham received no subsidy or

gift, that issue is no longer open to litigation. While it is true that the respondents Cole and Fried were not parties to the *64th St. Residences* litigation, the present petitioners were members of the class whose representatives there argued unsuccessfully that Fordham was receiving a subsidy. Having once litigated that issue and lost, members of the complaining class would not be able to raise it again in New York State courts against the same or different defendants. *Israel* v. *Wood Dolson Co.*, 1 N.Y. 2d 116, 134 N.E. 2d 97; *Good Health Dairy Products Corp. of Rochester, N.Y.* v. *Emery*, 275 N.Y. 14, 9 N.E. 2d 758. The federal courts must test the effect of the state court judgment by the rules the state court itself would apply. *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 309 U.S. 4; *Wright* v. *Georgia R.R. & Banking Co.*, 216 U.S. 420; *Covington* v. *First Nat. Bank*, 198 U.S. 100; *Union & Planters' Bank* v. *Memphis*, 189 U.S. 71; cf. *Angel* v. *Bullington*, 330 U.S. 183. Therefore, the court below was clearly correct in holding that it has been finally determined that Fordham University was not subsidized with government funds.

2. Section 105(d) of the Housing Act of 1949, 42 U.S.C. 1455(d), requires the local public agency to conduct public hearings concerning the proposed redevelopment plan. Accordingly, the respondent Board of Estimate of the City of New York held extensive public hearings prior to the submission of the plan to the HHFA. Consequently, it is clear that the hearing requirement of Section 105(d) was satisfied and the petitioners do not contend otherwise. Rather, they argue that they did not receive an adequate hearing by the Administrator on the feasibility of the method for

relocating the families displaced from the Lincoln Square area (Pet. 11-16).[5]

a. While we believe the only hearing to which the petitioners were entitled was before the local agency (see *infra*, p. 14), it is important to note, first of all, that the Administrator accepted their extensive petition and memorandum, and assured petitioners' counsel that the information furnished would "be considered with other documentation when the application for loan and grant is reviewed by our New York Regional Office." (See *supra*, p. 5.) Therefore, in asserting that they were denied "an opportunity to intervene and be heard" (Pet. 5), petitioners are complaining simply that they were not afforded an *oral* hearing.

b. The petitioners' claim that they were not afforded their full administrative rights is grounded on the requirement in Section 5 of the Administrative Procedure Act respecting notice and hearing "[i]n every case [where] adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing * * *." 5 U.S.C. 1004. The petitioners, though, are unable to point to any provision in the Housing Act requiring an agency hearing prior to the approval of a redevelopment plan; on the contrary, they concede that the Act "specifies only a hearing before a local

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[5] While it is not necessary to detail the point here, it is clear that the petitioners' contention that they were not afforded an adequate hearing is barred by laches. The agency letters which the petitioners contend constituted a denial of their administrative petition were received a year and a half before the institution of the present action (R. 1a, 17a, 68a, 70a). During the interim, the HHFA approved the City's plan and advanced federal funds, and the property in the project area was condemned and sold to redevelopers (see *supra*, pp. 4-6).

public agency * * *." (Pet. 12.) The requirement for that hearing was fully satisfied. (See *supra*, p. 5.)

The petitioners infer, however, a statutory hearing requirement from Section 101(c) of the Housing Act, 42 U.S.C. (Supp. V) 1451(c), which directs the Administrator to review locally-submitted redevelopment proposals to determine whether they conform to the standards prescribed by Congress. The answer to petitioners' argument is that the Administrator's review of the "workability" of the City's redevelopment plan was not "adjudication." "Its primary concern [was not] with individual rights, liabilities for past conduct, or present status under existing law * * *." *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 693 (C.A. 9), certiorari denied, 338 U.S. 860; cf. *Philadelphia Co.* v. *Securities and Exchange Com'n*, 175 F. 2d 808, 816 (C.A. D.C.), vacated as moot, 337 U.S. 901. Rather than being directed at individual persons, the Administrator reviewed a "situation" where "[i]ndividual protestations of injury are normally and necessarily lost in the quantum of the greater good." *Willapoint Oysters* v. *Ewing*, *supra*, at 693. For this reason the cases relied upon by petitioners, *i.e.*, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, *Riss & Co.* v. *United States*, 341 U.S. 907, and *Cates* v. *Haderlein*, 342 U.S. 804, are inapposite. In each of them, unlike this case, the administrative action was unmistakably adjudication of an individual's rights or status; in each, the critical issue was whether the adjudication was "required by statute to be determined on the record after opportunity for an agency hearing".

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[6]

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys.

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[6] In their disposition of the case the courts below erred, we believe, in concluding that the trial court had jurisdiction over the indispensible parties. Consequently, if the petition is granted, we may again urge that the district court should have dismissed the action without reference to the merits of the claims.

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